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A

DIGEST

OF

The Decisions of the Supreme Court

OF THE

STATE OF CALIFORNIA,

CONTAINED IN THE SIXTEEN VOLUMES OF REPORTS,

FROM THE FORMATION OF THE COURT, IN 1850, UNTIL JANUARY, 1861.

WITH A COMPLETE LIST OF

CASES AFFIRMED, REVERSED, QUALIFIED, COMMENTED UPON, OR ABROGATED BY STATUTE.

IN TWO VOLUMES—VOL. II.

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LACHES.

1. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Kritzer* v. *Mills*, 9 Cal. 23.

2. L. advanced to H. four hundred and seventy-six dollars, and received from H. for collection an order for the amount upon a party indebted to him. The order not being collected, L. returned it to H., and took H.'s note for the amount advanced. In a suit on the note H. set up as a defense, laches on the part of L., in not presenting the order, by means of which the debt was lost: held, that if there were any laches, they were waived by the execution of the note. *Leonard* v. *Hastings*, 9 Cal. 237.

See ERRORS, MISTAKE, NEGLIGENCE.

LAND.

I. IN GENERAL.

1. In an application for an order to incorporate a college under the act of 1850, it is necessary that subscriptions of real estate, if such subscriptions must not be cash under the statute, should define the boundaries or situation of the lands proposed to be given, and their value established.* *Ex parte The California College*, 1 Cal. 330.

2. Where land is attached by process of law, and the possession of the owner not disturbed, it is difficult to perceive how any thing further than nominal damages can be recovered for the injury caused by the attachment. *Heath* v. *Lent*, 1 Cal. 411.

3. An agent authorized by power of attorney to wind up and adjust the affairs of a mercantile house in New York, which had been conducted in the name of his principal, derives no authority from such power to bind his principal by a promissory note given for the purchase of real estate in San Francisco. *Fisher* v. *Salmon*, 1 Cal. 413.

4. Where a note was given on the sale of real estate, and the vendor had neither title, color of title, nor possession: held, that the consideration of the note might be enquired into as between the original parties, and there being no consideration, that the payee could not recover against the maker; and that a guaranty on the note without a consideration was not liable. *Ib.* 414.

5. A party already having the legal and equitable title, cannot sue for a further conveyance. *Truebody* v. *Jacobson*, 2 Cal. 82.

6. Caveat emptor applies to sales of real estate where there is no fraud or warranty. *Salmon* v. *Hoffman*, 2 Cal. 141.

7. Though a deed executed by an agent having power to convey in his own name be inoperative as a conveyance, it will be good as an agreement to convey, and the principal may be decided to convey. *Ib.* 142.

8. It is incumbent on him who asks the interposition of a court of equity to enforce a specific performance for the conveyance of land, that not only his possession, but that all his conduct in relation to the purchase be in good faith. *Conrad* v. *Lindley*, 2 Cal. 175.

9. A parol promise to pay for improvements upon land is not within the statute of frauds. *Godeffroy* v. *Caldwell*, 2 Cal. 292.

10. The authority by act of the legislature to a city or county to erect a court house and jail, would necessarily embrace the power to purchase the land on which to erect them. *Dewitt* v. *City of San Francisco*, 2 Cal. 295.

11. A power of attorney given "to at-

*The above law is repealed by the corporation act.

tend to all business affairs appertaining to real or personal estate," is too indefinite to sustain a transfer of real estate, more particularly that acquired long subsequent to its execution. *Lord* v. *Sherman*, 2 Cal. 501.

12. Where an assignment does not in terms convey real estate, and cannot be fairly construed so to do, it is inadmissible to prove a conveyance previous to a given date, and the equitable ownership of the land in question. *Ib.* 502.

13. A purchaser under an implied warranty quietly to possess and enjoy, while he retains possession, cannot resist the payment of the purchase money, however defective the title, and has no right to a rescission of his contract. *Fowler* v. *Smith*, 2 Cal. 569.

14. Where one has an outstanding deed, which improperly clouds the title of the true owner, on the application of the latter, chancery will cancel and annul the deed, and will on like application interpose and prevent a sale, and the consequent execution of an improper deed. *Shattuck* v. *Carson*, 2 Cal. 589; *Guy* v. *Hermance*, 5 Cal. 75.

15. In an action to recover the purchase money of land, founded on a contract, in which the plaintiff contracted to deliver a warranty deed for the land; the defendant in his answer denied that the plaintiff was the lawful owner or that he had any title to the land, it was held that to have enabled him to rescind the contract the defendant was bound to aver and to show a paramount title in another, and failing in this, his defense to the action was defective. *Thayer* v. *White*, 3 Cal. 228; *Riddell* v. *Blake*, 6 Cal. 262.

16. A deputy sheriff may execute a deed for land sold under execution, but in the name of the sheriff, otherwise it is decisive against the party claiming under it. *Lewes* v. *Thompson*, 3 Cal. 266.

17. The statute regulating sheriff's sales of real estate does not design to invest the purchaser with a title until six months after the sale. *Duprez* v. *Moran*, 4 Cal. 196; *Cummings* v. *Coe*, 10 Cal. 531.

18. Under the code it is competent for the plaintiff to recover real property with damages for withholding it, and the rents and profits, and in the same action and as one cause of action. *Sullivan* v. *Davis*, 4 Cal. 292.

19. A power of attorney confirming all sales, leases and contracts of every description, confers the power to sell land. *Ib.*

20. The statute of frauds contains no provision with regard to the dissolution of agreements or contracts under seal for the sale of lands. *Beach* v. *Covillaud*, 4 Cal. 317.

21. Questions as to the performance of the conditions contained in a grant, can only be made by the grantor, and not by a mere naked trespasser. *Buckelew* v. *Estell*, 5 Cal. 108.

22. Lands held by no other tenure than possession may be the legitimate subjects of control; and sometimes in equity, chattel interests or personal property are made the subject of specific performance. *Johnson* v. *Rickett*, 5 Cal. 220.

23. The State has the most perfect right to determine what shall constitute evidence of title as between her own citizens, to all lands within her boundaries, and the act in question does only this in reference to a portion of them. *Nims* v. *Palmer*, 6 Cal. 13.

24. A bill in the nature of a bill of peace, and praying for a discovery against joint and several trespassers on real estate, will not lie in favor of a plaintiff out of possession, claiming title to the land. *Ritchie* v. *Dorland*, 6 Cal. 40.

25. It would be a great hardship to require a party in every instance to enclose his lands by a substantial fence; such enclosure would be evidence of possession, but the evidence of it would not be conclusive as against other acts of possession. *O' Callaghan* v. *Booth*, 6 Cal. 65.

26. If by construction of a railroad through the enclosure of a farmer, it is made necessary to construct fences on either side of the road to protect his crops, the cost of such fences must be included in the compensation to be paid by the railroad company. *Sacramento Valley R. R. Co.* v. *Moffatt*, 6 Cal. 75.

27. A sale of land at auction where no note or memorandum is made by the auctioneer, and no writing exists between the parties, is void by the statute of frauds. *People* v. *White*, 6 Cal. 75.

28. Prima facie the governor of California, under the Mexican dominion, had the power to make a grant of mission lands to an individual, and a demurrer to

a complaint setting forth such grant on the ground of want of authority in the governor is not sustainable. *Den* v. *Den*, 6 Cal. 82; *Brown* v. *City of San Francisco*, 16 Cal. 458.

29. A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money, on the ground that he is entitled to it as the oldest judgment and execution creditor; especially when there is an unsettled contest as to the priority of liens. *Williams* v. *Smith*, 6 Cal. 91.

30. Where an action was for restitution of land, and pending an appeal the plaintiff transferred his judgment to a third party, and sold the premises to the defendant, the plaintiff's recourse for rent, if any, is for use and occupation, and not on the appeal bond. *Osborn* v. *Hendrickson*, 6 Cal. 175.

31. A party cannot avail himself of a proceeding in chancery to avoid the payment of the purchase money, without offering to rescind the contract and return possession of land to the defendant. Nor does the fact that he has made valuable improvements take the case out of the rule. *Jackson* v. *Norton*, 6 Cal. 189.

32. The fact that the title of land is in dispute between the claimants and the United States, and that the claimants under a Mexican grant are in possession, affords no ground for exempting the land from taxation. *Robinson* v. *Gaar*, 6 Cal. 275.

33. On the trial of an issue of fact involving the validity of a will, a subscribing witness thereto is not rendered incompetent as a witness, by holding lands devised therein, in trust for a devisee, and without having any interest therein himself. *Peralta* v. *Castro*, 6 Cal. 357.

34. Where in an action on a promissory note the defense is that it was the consideration for a deed from plaintiff for certain land, under false and fraudulent representations that plaintiff had an interest therein, the defendant, if he would avoid the payment, must offer to surrender the deed to be canceled, so that both parties could have been remitted to their original rights. *Tissot* v. *Throckmorton*, 6 Cal. 473.

35. It is a familiar principle of equity that time is not of the essence of a contract for the sale of land unless made so by the express agreement of the parties, yet in every case it will devolve upon the party seeking relief in equity to account for his delay. *Brown* v. *Covillaud*, 6 Cal. 571.

36. Where a party seeks to enforce a contract to convey land to him, if there are circumstances showing culpable negligence on his part, or if the length of time which has been permitted to intervene, together with other circumstances, raises a presumption of abandonment of the contract, or if the property has greatly enhanced in value, and he has apparently laid by for the purpose of taking advantage of this circumstance, he will not be entitled to a decision in his favor. *Brown* v. *Covillaud*, 6 Cal. 571; *Pearis* v. *Covillaud*, 6 Cal. 621; *Green* v. *Covillaud*, 10 Cal. 324.

37. Damages assessed for the value of land taken for a railroad, should be paid to the true owner, if he recovers possession before the damages are paid by the company; although at the time of the damage a trespasser was in possession, who had filed his claim to the damages. *Rooney* v. *Sacramento Valley R. R. Co.*, 6 Cal. 640.

38. Great inadequacy of consideration paid for land, as compared with its actual value, is sufficient to put the purchaser upon notice of a fraud by his vendor in the purchase thereof, at a constable's sale. *Argenti* v. *City of Sacramento*, 6 Cal. 679; *Hart* v. *Burnett*, 15 Cal. 608.

39. A right to land in its broadest sense, implies a right to the possession and the profits accruing therefrom, since without the latter the former can be of no value. *Billings* v. *Hall*, 7 Cal. 7.

40. A verbal sale of land is not valid under the Mexican law. *Hayes* v. *Bona*, 7 Cal. 158; *Stafford* v. *Lick*, 10 Cal. 17.

41. Where the plaintiff filed a bill in equity, in 1852, to set aside a sale of land made in 1835, on the ground of fraud: held, that his right to recover would be barred by ten years' prescription under the Mexican law, and that the full period having run, he could not recover. *Dominguez* v. *Dominguez*, 7 Cal. 427.

42. Parties in possession of land, claiming title thereto, are presumed to be the owners thereof, and entitled to compensation before it can be taken for public uses. *Sacramento Valley R. R. Co.* v. *Moffatt*, 7 Cal. 579.

43. When a party in consideration of a

conveyance of land to him, agrees to pay an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement, at the same time acknowledging his liability: held, that the liability thus assumed is not the conditional liability of an endorser, but a primary and unconditional obligation to pay the note, for which he had received a full consideration. *Palmer* v. *Tripp*, 8 Cal. 97.

44. An appropriation of land carries with it the water on the land or a usufruct in the water, for in such cases the party does not appropriate the water, but the land covered with the water. *Crandall* v. *Woods*, 8 Cal. 143.

45. Where a claim to a tract of land under a Mexican grant, somewhere within a certain larger tract, was ascertained, and the land segregated by a survey, under a decree of confirmation by the United States supreme court: held, that the land became immediately taxable, and that an assessment thereof will be presumed to have been made after the survey, where the time allowed by law for the assessment extended to a day four days after the survey. *Palmer* v. *Boling*, 8 Cal. 389.

46. The authority to sell land conferred by a writ in the sheriff's hands, carries with it authority to execute all the instruments required by law to the completion of the sale, viz: a certificate; and in case of no redemption, a conveyance to the purchaser. *People* v. *Boring*, 8 Cal. 407; *Anthony* v. *Wessel*, 9 Cal. 104.

47. The order of the probate court directing the sale of the land of the deceased, is a judicial act. *Halleck* v. *Guy*, 9 Cal. 195.

48. An action for a false and fraudulent representation as to the naked fact of title in the vendor, of real estate, cannot be maintained by the purchaser, who has taken possession of the premises sold under a conveyance with express covenants. *Peabody* v. *Phelps*, 9 Cal. 226.

49. The right of the wife to acquire property by purchase during the marriage, can only exist as an exception to the general rule as laid down by the "act defining husband and wife." *Alverson* v *Jones*, 10 Cal. 12.

50. The judgment of the board of land commissioners, the tribunal of original jurisdiction, is sufficient evidence of the confirmation of the grant, unless the judgment be reversed, or its operation suspended by an appeal, which is still pending. *Sanders* v. *Whitesides*, 10 Cal. 90.

51. Until a consummation of a sale of land upon execution is made by a conveyance from the sheriff, the estate remains in the judgment debtor. *Cummings* v. *Coe*, 10 Cal. 531.

52. A trespasser upon lands of another cannot justify his acts by setting up an outstanding title, in which he has no priority. *Weimer* v. *Lowery*, 11 Cal. 112.

53. A decree of confirmation of a grant of the United States land commission and the United States district court, cannot be impeached in an action of ejectment between a party claiming under the grant and a third party. *Rose* v. *Davis*, 11 Cal. 140.

54. A private survey is no legal evidence of the facts contained therein, since if it were, any man might recover another's land by including it himself or getting some one else to do it within his boundaries. *Ib.* 141.

55. Where a party takes possession of a part of a tract of land under a deed of conveyance to the whole, and at the time of entry no one is holding adversely, such possession will extend to the whole tract described in the deed. *Ib.*

56. There can be no such thing as an abandonment of land in favor of a particular individual and for a consideration. *Stephens* v. *Mansfield*, 11 Cal. 365.

57. Where the vendee's agent, in the purchase of a tract of land, has actual notice of a mortgage on the premises at the time of purchase, the vendee will be presumed to have taken the property subject to the mortgage. *May* v. *Borel*, 12 Cal. 91.

58. The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud* v. *El Dorado County*, 12 Cal. 133.

59. Property acquired by the husband and wife during the marriage and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community; whilst property acquired by either of them by lucrative title is solely constituted the separate property of the party

making the acquisition. *Scott* v. *Ward*, 12 Cal. 471; *Noé* v. *Card*, 14 Cal. 596.

60. Possession of land at the death of a party gives prima facie title to his heirs or representatives. *Gregory* v. *McPherson*, 13 Cal. 572.

61. M. & B., the plaintiff, were partners in a ranch and hotel. The ranch was public land, taken up under the State law in the name of M. M. sells one-half to B., taking a mortgage back, B. agreeing to pay certain firm debts. This sale and agreement were afterwards canceled, and B. sold M. one-half the ranch. Defendant, Myers, agrees to buy of B. his half of the ranch; goes into possession, but afterwards refuses to buy, and buys the half from O., who bought the whole of M. At the time of this last purchase, O. and M. knew of B's title: held, that a bill in equity by B. against M., O. and Myers for an account of the partnership between M. and B., and for a decree establishing plaintiff's right to the ranch, does not lie; that his remedy at law for his half of the ranch against M., or any one claiming under him, with notice of his title, is clear; and that M. would be estopped from disputing the title. *Brush* v. *Maydwell*, 14 Cal. 209.

62. The statutory lien of a judgment upon the real estate of the judgment debtor attaches only upon property in which such debtor has a vested legal interest. *People* v. *Irwin*, 14 Cal. 434.

63. A deed of land from A. to F., reciting the consideration at one hundred dollars and a contract not under seal, not acknowledged nor recorded, from F., agreeing to reconvey the land to A. upon payment within a given time of $8,600, with interest at a specified rate, deducting the rents and profits of the land during the period limited for payment, were delivered between the parties at the same time: held, that the deed is not a mortgage in the absence of proof, that the consideration for it was a debt preëxisting, or created at the time, and still subsisting between the parties; that the provisions in the contract of reconveyance relative to the payment of interest and the rents and profits do not necessarily imply the existence of a debt, which is essential to a mortgage. *Ib.* 435.

64. Where the lease gives the lessee the privilege of purchasing the land at the expiration of the lease on certain terms, the privilege is limited to the whole land, and the lessee, or the purchaser from him of a portion of the land, cannot claim the right to buy that portion. *Hitchcock* v. *Page*, 14 Cal. 443.

65. Death of the principal revokes the authority of the agent, and a deed of land made by him after such death does not bind the representatives of the principal. *Travers* v. *Crane*, 15 Cal. 16.

66. But if the agent has a power coupled with an interest, that is, a power which conveys to the agent an interest in the property, then the execution of the power after the death of the principal is good. *Ib.*

67. If, on an executory contract for the purchase of land made by plaintiff with the agent during the life of the principal, money due the principal was paid after his death to the agent, who settled the amount with the estate, so that the estate received the benefit of the payment, plaintiff would be entitled, in equity, to call for the legal title, and could defend in ejectment by the representatives of the principal. *Ib.*

68. The complaint avers title in plaintiff to a tract of land; that the possession of defendants is forcible and unlawful; that an action for forcible entry has been commenced by plaintiff against defendants, and is still pending and undetermined, and asks for an injunction to restrain defendants from cutting and removing timber from the land, without seeking in this suit to be restored to the possession, the object of the suit being to preserve the property during the pendency of the action: held, that injunction lies, although no action at law has been brought to try the title; that the jurisdiction of equity in such cases to grant, first, a temporary and subsequently a perpetual injunction, does not depend upon the question whether or not such action at law has been brought; that the rule under the English chancery system was the same, and that our statute is not more restrictive. *Hicks* v. *Michael*, 15 Cal. 116.

69. Land will sometimes pass without any specific designation of it as land. Thus the grant of a messuage, or a messuage with the appurtenances, will pass the dwelling house and adjoining buildings; and also, its curtilage, garden and

orchard, together with the close in which the house is built. *Sparks* v. *Hess*, 15 Cal. 195.

70. The rule is, that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing to the grantee. *Ib.*

71. So, the sale of a "bridge" across a certain stream, "together with the toll-house, stables and out-houses of every description," and "all the privileges and appurtenances appertaining, or in any wise belonging to said bridge," passes the land upon which the bridge rested and the other buildings were erected. *Ib.*

72. The doctrine that land may often pass by conveyance as essential to the enjoyment of, or as parcel of buildings, etc., erected thereon, is consistent with the doctrine that the ownership of the land may be in one person, and the ownership of the structures thereon in another—as in these latter cases the buildings are erected by permission of the owner of the land for the use of the builder, and generally under mutual expectation by the parties of their removal, or of compensation being made for them to the builder, or of the latter ultimately acquiring title to the land. *Ib.* 197.

73. Where a party purchases a bridge, toll-houses, stables and out-houses appurtenant, with the right and privilege of his vendor in and to a "dug road" made on each side of the bridge, neither the purchaser, nor those claiming under him with notice, can object to a decree enforcing the vendor's lien against the premises, that the "dug road" is public land, and that therefore nothing would pass under a sale upon the decree. *Ib.*

74. In a contract for the sale and purchase of land, which is silent as to the possession, there is no implied license for the purchaser to enter. *Gaven* v. *Hagen*, 15 Cal. 211.

75. Z., the owner of land, contracts in writing to sell it to K., nothing being said as to the possession. K. is to give three notes, falling due at different periods, for the purchase money. The first two notes become due at very short dates, and after they are paid Z. is to make a deed to K., with covenants against his own acts. First note is paid before the second falls due; Z. deeds the land to plaintiff, subject to the contract with K., the deed containing covenants of warranty against acts of the grantor. Later, and on the day the second note is due, K. sells the land to McE., one of the defendants. K. took possession under the contract. Shortly after, plaintiff demanded of K. the payment of the second note, and tendered him a deed from himself (plaintiff) to K., with the covenants mentioned in Z.'s contract. K. said he could do nothing. Plaintiff then formally demanded payment and execution of the mortgage. K. wished to see his attorney. After the third note fell due, plaintiff demanded of McE. payment of the two notes, tendering the deed from Z. to him, (plaintiff) and also a deed from himself to McE., offering also a mortgage to be executed by McE. to secure the third note and demanding possession. McE. refused: held, that, under the contract, the purchaser was not entitled to possession at once; that payment of the first two notes or tender was a condition precedent to his right of possession; that until then, the vendor Z., or his assignee, had the legal title and could maintain ejectment against the vendee. *Ib.*

76. Section two hundred and fifty-four of the practice act enlarges the class of cases in which equitable relief could formerly be sought in quieting title. It authorizes the interposition of equity in cases where previously bills of peace would not lie. *Curtis* v *Sutter*, 15 Cal. 262.

77. Under this section, a party in possession of real property may bring a bill in equity to quiet title against a party out of possession, who claims an estate or interest adverse to him, without waiting until he has been disturbed in his possession by legal proceedings against him, in which his title has been successfully maintained. *Ib.*

78. Suit under section two hundred and fifty-four of the practice act only lies with reference to property of which the plaintiff is in possession, and where suit is brought, under that section, to quiet title to a ranch, and plaintiff is in possession of a portion only, the suit must be considered as brought to determine the title to that portion, and no injunction lies to restrain parties who are entire strangers to the title from selling that portion, as their conveyances would not cloud plaintiff's ti-

tle. And if the grantees under such conveyance should invade the possession of plaintiff, or unlawfully detain the same, the remedy at law is ample. *Ib.*

79. A tract of land was held by several tenants in common, and on partition, a certain portion was set apart and quitclaimed to plaintiff, representing M., who had conveyed to plaintiff as security for endorsements. Another portion of the land was set apart and quitclaimed to H. The portion thus received by H. was subsequently conveyed to plaintiff, and embraces the land in controversy: held, that plaintiff is not mortgagee of the premises; that even if he held the premises conveyed by H. to him as security for the indorsements of M., it was as trustee of the legal title; that the title had passed from H., and had never been in M., except of an undivided interest before the partition, and was therefore in plaintiff, who could maintain ejectment. *Seaward* v. *Malotte*, 15 Cal. 307.

80. In ejectment, plaintiff offered to introduce in evidence an executory contract by which S. & Co. agreed to sell to Wooster the land sued for, and when the purchase money was paid, to make a deed, W. to take possession at once, and to retain it so long as he complied with the contract. Plaintiff stated it to be his intention to show, in connection with the contract, that the defendant claimed under Wooster. The answer averred that Wooster mortgaged the premises to defendant, who foreclosed, and went into possession under the sheriff's deed: held, that the contract, with the other proof, was prima facie relevant to the issue, plaintiff's object being to show that Wooster had forfeited his rights under the contract, and that he, plaintiff, had succeeded to the right and title of S. & Co. *Palmer* v. *McCafferty*, 15 Cal. 335.

81. A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person who does not complain. Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor. *Treadwell* v. *Payne*, 15 Cal. 499.

II. Public Land.

82. The prospective preëmption act of Congress of 1841 is expressly confined to the surveyed lands, and was not extended to California at the time of the trespass, and a title under that act, or under the California statute of April, 1852, passed after the commencement of the suit, will not enable plaintiff to maintain an action against another about to cloud the title. *O'Connor* v. *Corbitt*, 3 Cal. 371.

83. Where the complaint alleged that in September, 1849, the plaintiff settled upon a tract of land, "the same being public land of the United States;" that subsequently a foreigner occupied a portion of it, and that defendant, his executor, is now offering the same for sale, and prays to enjoin said sale: held, that the injunction will not lie. *Ib.*

84. A system of preëmption has been adopted in all the territories and new States to encourage the immigration of foreigners, and there is no discrimination between foreigners and native citizens. *People* v. *Folsom*, 5 Cal. 379.

85. Prior possession of public lands will entitle the possessor to maintain an action against a trespasser. *Grover* v. *Hawley*, 5 Cal. 486.

86. The right of enjoyment of possession to public lands may descend among the effects of a deceased person to the executor or administrator, and the right of the deceased be conveyed by a regular sale to another. *Ib.*

87. The statute making out the possessory right of settlers on public lands for agricultural or grazing purposes yield to the rights of miners has legalized what would otherwise be a trespass, and the act cannot be extended by implication to a class of cases not especially provided for. *Burdge* v. *Underwood*, 6 Cal. 46.

88. To enable a party to recover lands under the possessory act of this State, it is necessary that he shall have complied with the provisions of the act. *Sweetland* v. *Froe*, 6 Cal. 147.

89. The lands settled by the missions were not conveyed to any one, but remained the property of the government, and even the church buildings thereon did not become the property of the church corporate until the decree of seculariza-

tion of 1833. *Nobili* v. *Redman*, 6 Cal. 342.

90. The right to be protected in the possession of the public lands in this State is founded alone on the doctrine of presumption, for a license to occupy from the owner will be presumed. *Conger* v. *Weaver*, 6 Cal. 556.

91. The settlers' act of 1856 does not discriminate between an innocent and a tortious possession, nor is it a mere attempt to avoid circuity of action by providing for an equitable adjustment of the whole subject in one suit. By its terms, it applies to past as well as present cases. It takes from a party that which before was his, for if he refuses to pay for the improvements on his land, against his will, by a trespasser, he loses not only the improvements but the land itself. Such legislation is repugnant to morality and justice, and in violation of the letter and spirit of the constitution. *Billings* v. *Hall*, 7 Cal. 6.

92. One who locates upon public lands for the purpose of appropriating them to his own use, becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired. *Crandall* v. *Woods*, 8 Cal. 143.

93. A party has no lawful right to turn a settler off by force, conceding that the former had the legal title to the land. *People* v. *Honshell*, 10 Cal. 87.

94. A party cannot, under pretense of holding land in exclusive occupancy as a town lot, take up and inclose twelve acres of mineral land in the mining districts, as against persons who subsequently enter upon the land in good faith for the purpose of digging gold therein, and who in such operations do no injury to the comfortable use of the premises as a residence, or of any mechanical or commercial business. *Martin* v. *Browner*, 11 Cal. 14.

95. The right to a preëmption in public land is not assignable, but it may be mortgaged. *Whitney* v. *Buckman*, 13 Cal. 539.

96. Neither the act of 1858, as to the location of seminary land, nor the act of Congress donating it, allows mineral land to be located. *Burdge* v. *Smith*, 14 Cal. 383.

97. How far the right of miners to go upon public mineral land in possession of another for the purpose of mining must be modified to secure any rights of such possessor, reserved. *Ib.*

98. The possession of agricultural land is prima facie proof of title against a trespasser, but where it is shown that a party goes on mineral land to mine there is no presumption that he is a trespasser, and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Ib.*

99. The presumption under our statute is that all land in the State is public land, until the legal title is shown to have passed from the government to private parties, and this presumption is reconcilable with the presumption of title arising from possession. *Ib.*

100. A party claiming land under the possessory act of 1852, must show compliance with the provisions of the act. He must be a citizen of the United States; must file the affidavit required by section 2; and make his improvements within the ninety days, &c. Merely residing on a part of the land, tracing lines, putting up stakes for boundaries, &c., is not sufficient. *Wright* v. *Whitesides*, 15 Cal. 47.

101. Mere entry on public land, without enclosing it, does not give a right of action on the possession alone. *Ib.*

102. Miners have a right to enter upon public mineral land, in the occupancy of others for agricultural purposes, and to use the land and water for the extraction of gold — the use being reasonable, necessary to the business of mining, and with just regard to the rights of the agriculturist. And this, whether the land is enclosed, or taken up under the possessory act. *Clark* v. *Duval*, 15 Cal. 88.

103. The right so to enter and mine, carries with it the right to whatever is indispensable for the exercise of this mining privilege — as the use of the land, and such elements of the freehold or inheritance as water. *Ib.*

104. Merely going on waste, uninclosed public land, and building and occupying a house and corral, and even subsequently cutting hay on part of the land, does not give a party any claim to or possession of the whole tract of one hundred and sixty acres. The case would be different if the

party claimed and entered under the possessory act of this State, and pursued the necessary steps prescribed by it; or, probably, if he had made his entry under the preëmption laws of the United States. *Garrison* v. *Sampson*, 15 Cal. 95.

105. Where, in such case— there being no claim under the possessory act, or the preëmption laws of the United States— plaintiff claims one hundred and sixty acres by force of his prior possession, and a contract or consent on the part of defendant, whom he let into possession, to hold the premises for him, or subject to his order, the judgment cannot be in favor of plaintiff for the whole tract, but only for the small part on which the house and corral were situated, and of which plaintiff was in the actual occupancy— there being no proof, except defendant's general consent as above named, that the defendant agreed to hold the whole tract for plaintiff. *Ib.*

106. In ejectment for mineral lands, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, were insufficiently denied in the answer; but the answer averred affirmatively that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States, contained large and valuable deposits of gold; that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The court below gave judgment for plaintiff on the pleadings. Held, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings, because the character of his possession did not appear, the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever. *Smith* v. *Doe*, 15 Cal. 104.

107. The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining. *Ib.*

108. New States, under the act of September 4th, 1841, acquire their interest upon their admission into the Union, and may make selections of land before the survey of the United States— which selections are only subject to three qualifications: 1st, they must not be of lands reserved from sale by any law of Congress or the proclamation of the President; 2d, they must be in parcels of not less than three hundred and twenty acres each; and 3d, the parcels selected must be in such form as to correspond with the survey of the United States, when made. *Doll* v. *Meador*, 16 Cal. 331.

109. State selections will not become absolute and definite until the survey— until then, the parcels selected may be subject to a possible reservation from sale; and when there is no such reservation, they may require some change in their exterior lines, so as to conform to the official sectional divisions and subdivisions. In the legislation of the State, provision is made so as to secure such conformity. *Ib.*

110. In controversies respecting public lands, other than mineral lands, the title, as between citizens of the State, where neither party connects himself with the government, is considered vested in the first possessor, and to proceed from him. This possession must be actual and not constructive; and the right it confers must be distinguished from the right given by the possessory act of this State. *Coryell* v. *Cain*, 16 Cal. 573.

111. In this State, although the larger portion of the mineral lands belong to the United States, yet defendant cannot defeat an action for mining claims, water privileges and the like, by showing the paramount title of the government. Our courts, in determining controversies between parties thus situated, presume a grant from the government to the first appropriator. This presumption, though of no avail against the government, is held absolute in such controversies. *Ib.*

III. Pueblo Land.

112. Under the Mexican laws, municipal lands become the absolute property of the pueblo, subject only in their disposition

to the general laws of Mexico. *Cohas* v. *Raisin*, 3 Cal. 448.

113. It is too late now to question the authority of an alcalde elected in 1846. If invalid, his acts as a de facto officer must be held good by this court. *Ib.* 452.

114. By the laws of Mexico towns were invested with the ownership of land. *Ib.* 453.

115. By the laws, usage and customs of Mexico the alcaldes were the heads of the ayuntamientos; were the executive officers of the towns, and rightfully exercised the power of granting lots within the towns, which were the property of the towns. *Ib.*

116. Before the military occupation of California by the army of the United States, San Francisco was a Mexican pueblo, or municipal corporation, and was vested with title to the lands within her boundaries. *Ib.*

117. A grant of a lot in San Francisco, made by an alcalde, whether a Mexican or of any other nation, raises the presumption that the alcalde was a properly qualified officer, that he had authority to make the grant and that the land was within the boundaries of the pueblo. *Ib.*

118. If a private natural person can grant lands upon conditions subsequent and upon their nonperformance resume the ownership, then it follows from the views preceding that a municipal corporation can do the like. *Touchard* v. *Touchard*, 5 Cal. 307.

119. The power and authority of towns, under the Spanish and Mexican systems, to acquire and dispose of lands, and the conclusion there attained after a careful examination of the Spanish and Mexican decrees, places their right upon as high ground as that of natural persons. *Ib.*

120. Denouncement is the mode of taking advantage of the nonperformance of subsequent conditions in grants made by the government, and it is therefore the only mode, because the government has agreed that denouncement shall be the result of nonperformance. *Ib.*

121. After the adoption of the common law in 1850, the municipal and common lands of pasturage were liable to execution sale. *Welch* v. *Sullivan*, 8 Cal. 197; contra *Hart* v. *Burnett*, 15 Cal. 616. See *Holladay* v. *Frisbie*, 15 Cal. 634; *Wheeler* v. *Miller*, 16 Cal. 125.

122. The board of commissioners of the old sinking fund of 1850, created by an ordinance of the city of San Francisco, had no power to sell the real estate of the city, the ordinance being void. But this decision has no application to the board of commissioners of the funded debt, organized after the dissolution of the first board of the sinking fund commissioners. *Heydenfeldt* v. *Hitchcock*, 15 Cal. 514.

123. The pueblo of San Francisco had a certain right or title to the lands within its general limits, and the portions of such lands which had not been set apart or dedicated to common use or special purposes, could be granted in lots, by its municipal officers, to private persons, in full ownership. *Hart* v. *Burnett*, 15 Cal. 616.

124. The authority to grant such lands was vested in the ayuntamiento, and in the alcaldes or other officers who at the time represented it, or who had succeeded to its "powers and obligations." *Ib.*

125. The official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority. *Ib.*

126. These municipal lands, to which the city of San Francisco succeeded, were held in trust for the public use of that city, and were not, either under the old government or the new, the subject of seizure and sale under execution. *Ib.*

127. This property and these trusts were public and municipal in their nature, and were within the control and supervision of the State sovereignty, and the federal government had no such control or supervision. *Ib.*

128. The act of the State legislature of March, 1858, confirming the so-called Van Ness ordinance, was a legal and proper exercise of this sovereign power; and this act gave full effect to the provisions of that ordinance, and vests in the possessors therein described, as against said city and State, a title to the lands in said ordinance mentioned. *Ib.*

129. The city of San Francisco holds the municipal lands of the pueblo, not legally disposed of as hereinbefore explained; and that her title is wholly unaffected by sheriff's sales under execution against her, so far as those sales touch or affect the aforesaid pueblo lands. *Ib.*

130. A defendant in ejectment, holding

such lands merely by possession, may set up the invalidity of such sales, or the plaintiff's title derived therefrom, to defeat the plaintiff's action. *Ib.*

See ALCALDE, GRANT, SAN FRANCISCO.

IV. WATER LOTS IN SAN FRANCISCO.

131. In the plan of a city the survey into blocks, lots and streets extended into the tide waters in front of the city, the object of which was to reach a sufficient depth of water on the land line for the convenience of shipping, and it was necessarily anticipated that the water lots would be filled up to a level suitable for building or land carriage. *Eldridge* v. *Cowell*, 4 Cal. 87.

132. On the formation of the State government, the title to water property passed to this State. *Chapin* v. *Bourne*, 8 Cal. 296.

133. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition, either precedent or subsequent, annexed to the grant; and the property mentioned in the act is not devoted by the grant of the State to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is a leviable interest, subject to sale under execution. *Holladay* v. *Frisbie*, 15 Cal. 636; *Wheeler* v. *Miller*, 16 Cal. 125.

134. *Smith* v. *Morse*, 2 Cal. 524, deciding that the city's interest in this beach and water lot property can be sold on execution against the city, not to be disturbed; but any rights which "the commissioners of the funded debt of the city of San Francisco," under the act of May 1st, 1851, may possess in this property are not passed on. *Holladay* v. *Frisbie*, 15 Cal. 637.

135. A purchaser of beach and water lot property at a sheriff's sale, in August, 1851, on execution issued upon a judgment recovered in January, 1851, against the city of San Francisco, acquired a title, if the judgment became a lien upon the property sold, previous to the act of May 1st, 1851, and the conveyance from the commissioners of the sinking fund to the commissioners of the funded debt. *Wheeler* v. *Miller*, 16 Cal. 125.

136. In this case, as the record does not show that the judgment ever became such lien, the decision, giving title to the purchaser, must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. *Ib.*

See WATER LOTS.

V. SWAMP AND OVERFLOWED LAND.

137. The act of May 3, 1852, "providing for the disposal of the 500,000 acres of land granted by Congress to this State," is not in conflict with the act of Congress of 1841, which provides for their location after they have been surveyed. *Nims* v. *Palmer*, 6 Cal. 13.

138. This State has a right to dispose of the swamp and overflowed lands granted to her by Congress prior to the issuing of a patent from the United States so as to convey to the patentee a present title as against a trespasser. *Owens* v. *Jackson*, 9 Cal. 324; *Summers* v. *Dickinson*, 9 Cal. 556.

See SWAMP AND OVERFLOWED LANDS.

VI. OF COVENANTS OR RIGHTS TO LAND.

139. The assignment of a covenant to convey will not deprive the land of the lien; it is wholly controlled by the lien, and falls whenever it comes into conflict with it. *Truebody* v. *Jacobson*, 2 Cal. 287.

140. Where an assignment does not in terms convey real estate, and cannot be fairly construed to do so, it is inadmissible to prove a conveyance previous to a given date, and the equitable ownership of the land. *Lord* v. *Sherman*, 2 Cal. 502.

141. The transfer of a bond for title to land, upon a promise by the assignee to

pay a certain debt of the assignor, binds the assignee to perform the trust, and the obligation to pay the debt is not affected by any misrepresentations made by the assignor to the assignee, because the rights of the creditor under the transfer had already vested. *Connelly* v. *Peck*, 6 Cal. 353.

142. Nor is the obligation of the assignee affected by the fact that the land was partnership property of the assignor, and assigned where it was not so held out to the world, and where the partnership was unknown to the creditor. *Ib.*

143. Where the assignee was a commercial firm and the assignment was made to an agent acting as the trustee of the firm, and the agent obtained from the obligor in the bond a deed for the land to the members of the firm, and subsequently the firm sold the land to their successors in business, constituting a new firm of which some of the old firm were members: held, that purchasers are chargeable with notice of the trust. *Ib.*

144. The right to a preëmption is not assignable, but may be mortgaged. *Whitney* v. *Buckman*, 13 Cal. 539.

VII. Bond for a Title.

145. An assignee of a covenant to convey cannot keep possession of land subject to a lien for purchase money, and also refuse the purchase money. *Trusbody* v. *Jacobson*, 2 Cal. 286.

146. A vendor of real estate who makes no conveyance, but gives a bond conditioned for the execution of a conveyance on payment of the purchase money by the vendee, has an equitable lien on the land for the purchase money, and holds the legal title as security for the enforcement of his lien. *Gouldin* v. *Buckelew*, 4 Cal. 111.

147. Where the parties to a bond for title stipulate among themseles for a forfeiture, such forfeiture cannot defeat the plaintiff's rights to the purchase money. *Bagley* v. *Eaton*, 5 Cal. 500.

148. The breach of a bond for title does not discharge the debt due for the purchase money, and the plaintiff can resort to equity to enforce its performance, or maintain an action at law. *Ib.*

149. At common law a bond for a title is in effect a mortgage. The legal title remains in the vendor, and an equity vests in the vendee to have the title on compliance with the conditions. The legal title, as also the equity, goes to the whole estate and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclosure. *Merritt* v. *Judd*, 14 Cal. 73.

VIII. Warranty.

150. Generally a vendor with warranty of title is not a competent witness for his vendee in a controversy concerning the title. *Blackwell* v. *Atkinson*, 14 Cal. 471.

151. In real estate the covenant of warranty runs with the land, and the vendor is liable directly to the person evicted, and is not a competent witness for plaintiff. *Ib.*

152. A covenant of nonclaim in a deed amounts to the ordinary covenant of warranty, and operates equally as an estoppel. But this covenant is confined to the estate granted, and where that is "the right, title and interest" of the grantor, instead of the land itself, the covenant does not estop him from setting up an after acquired title. *Gee* v. *Moore*, 14 Cal. 473.

153. In considering the operation of a mortgage upon subsequently acquired title, it is immaterial whether it be regarded as a conveyance of a conditional estate as at common law, or as creating a mere lien or incumbrance, as by the law of this State whatever in the instrument, treating it as a conveyance, would operate to transfer a subsequently acquired title to the grantee, equally operates, treating the instrument as a lien or incumbrance, to subject such acquired interest to the purposes of the original security. *Clark* v. *Baker*, 14 Cal. 626.

154. By common law there were only two classes of conveyances which were held to operate upon after acquired title —those of feoffment, by fine or by common recovery—and those by indenture of lease, no other forms of conveyance in the absence of covenants of warranty had any effect in transferring the title subsequently acquired, a grant or lease only operated on the estate actually held at the time of its execution by the grantor or releasor. *Ib.*

155. The general doctrine prevailing in

the United States is that no estate can be passed by the ordinary terms of a deed unaccompanied with covenants of warranty, which is not vested in interest at the time, and that estates subsequently acquired, whether by purchase or descent, are unaffected by such previous conveyances in the hands of the grantor or those claiming under him. *Ib.* 627.

156. In the United States, conveyances by feoffment, fine or common recovery, are not in use, and no greater effect is given to a grant or a conveyance, by bargain and sale, or lease or release unaccompanied by covenants of warranty, than at common law under the statute of uses. *Ib.*

157. The general doctrine is, however, subject to this qualification—that where it distinctly appears on the face of the instrument, without the presence of the covenant of warranty, either by recital or otherwise, that the intent of the parties was to convey and receive reciprocally a certain estate—the grantor will be estopped from denying the operation of the deed according to such intent. *Ib.* 629.

158. The thirty-third section of the act concerning conveyances changes the rule of common law as to the effect of the deed, under the statute of uses, upon subsequently acquired interest of grantor, and gives to them an operation equivalent to the most expressive covenant of warranty. And this section applies to mortgages, equally as to conveyances, absolute in their form. *Ib.* 630.

See WARRANTY.

IX. VENDOR'S LIEN.

159. A vendor has a lien on the land sold for the purchase money, though he has executed the conveyance. *Salmon* v. *Hoffman*, 2 Cal. 142.

160. A failure of the vendee to pay the purchase money for two years does not forfeit his right under the contract, and the vendor may enforce payment at any time after due; and if the vendor, under power of sale reserved in the contract, sells the property, either at public or private sale, the surplus beyond the purchase money due belongs to the vendee, and payment may be decreed by a judgment. *Gouldin* v. *Buckelew*, 14 Cal. 111.

161. A vendor of real estate has a lien on the same in the hands of the administrator of the purchase money. *Cahoon* v. *Robinson*, 6 Cal. 226.

162. It would be a fraud which no court of equity could tolerate, to hold that the vendor of land on a contract to convey, receiving a portion of the purchase money, and seeing the vendee expend large sums of money, improving the property without objection, and not making any demand of the purchase money, should insist, because the vendee had not literally complied with the provisions of the contract on his part, on holding the whole contract forfeited, claim the land and the money paid and all the improvements, and deny on his part all obligation to comply with his engagements. *Farley* v. *Vaughn*, 11 Cal. 236.

163. Equity raises no lien in respect to real estate, except that of a vendor for the purchase money. *Ellison* v. *Jackson Water Co.*, 12 Cal. 554.

164. Land on which a vendor's lien exists for the purchase money, may become a homestead, but the homestead right is subordinate to the lien. *McHendry* v. *Reilly*, 13 Cal. 76.

165. The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon the failure of payment by the vendee. *Sparks* v. *Hess*, 15 Cal. 192.

166. This equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The court, after determining the amount of the lien, can, by its decree, either direct a sale of the property for its satisfaction and execution for any deficiency, or award an execution in the first place and a sale only in the event of its return unsatisfied, as the justice of the case may require. *Ib.* 193.

167. Where the contract of sale of real property is unexecuted, the vendor retaining the legal title for security until all the money is paid, the vendor's lien retained is different from the ordinary lien of a vendor after conveyance executed. In the latter case the vendor has parted with the legal and equitable title, and possesses only a bare right, which is of no operative

force or effect until established by the decree of the court. In the former case, the vendor's position is somewhat similar to that of a party executing a conveyance and taking a mortgage back. He may sue at law for the balance of his purchase money, or file his bill in equity for the specific performance of the contract, and take an alternative decree, that if the purchaser will not accept a conveyance and pay the purchase money, the premises be sold to raise such money, and that the vendee pay any deficiency remaining after the application of the proceeds arising from such sale. *Ib.* 194.

168. In such case of an unexecuted conveyance, the vendor may ask either a decree directing performance, and in case of refusal, a sale of the premises or a decree barring the right of the vendee to claim a conveyance under the contract. He may, however, insist upon a sale where performance is refused, and is not bound to take a mere foreclosure of the vendor's right to a deed. *Ib.*

See VENDOR'S LIEN.

X. ESTOPPEL.

169. The owner of land who stands by and sees another sell it, or silently permits another who believes his title good to expend money upon land, without making known his claim, is forever estopped from setting up his title against an innocent purchaser. *Godeffroy* v. *Caldwell*, 2 Cal. 491.

170. The fact that the plaintiff stood by and permitted defendant to settle on the land, will not warrant an instruction that the plaintiff is thereby estopped from asserting his title. *Gunn* v. *Bates*, 6 Cal. 272.

171. Where a party enters into the possession of land claiming under another and in subordination of his title, he is estopped from questioning it. *Ellis* v. *Jeans*, 7 Cal. 416; *Walker* v. *Sedgwick*, 8 Cal. 402.

172. Where a party has an equity and also actual possession of the land, a purchaser of the legal title is bound to take notice. *Bryan* v. *Ramirez*, 8 Cal. 467.

173. Where a person knowingly though passively looks on and suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to assert his legal right against such person. *Ib.*

174. Where the defendants, claiming to be preëmptioners of the premises in controversy under the laws of the United States, offered parol evidence to show that the four leagues as surveyed and patented to the plaintiff were different from the tract designated in the grant upon which the patent issued, and the map to which the grant made reference, and that a correct location of the tract as granted would not include the premises in suit: held, that the court properly excluded the evidence, as the patent is conclusive evidence of the validity of the original grant and of its recognition and confirmation, and of the survey and its conformity with the confirmation, and of the relinquishment to the patentee of all the interest of the United States in the land. *Boggs* v. *Merced Mining Co.*, 14 Cal. 361.

175. The private survey of Fremont to "Las Mariposas," in 1849, and his presentation of the same to the board of land commissioners as embracing and identifying the tract he claimed, and subsequent public and repeated disclaimers by him at the time the defendant took possession of the premises in controversy in 1851, and afterward up to July, 1855, of any title or claim to the property, and of any title or claim to any land within the exterior bounds of the grant to Alvarado, except that designated in his survey; and the fact that he knew of the occupation and improvements of the defendant from the time the possession was taken, without forbidding the same or claiming the premises until July, 1855, do not estop him from claiming the premises under his patent, there being no proof that he made such declarations and disclaimers willfully, or that he intended to deceive or defraud defendant or influence his conduct. *Ib.* 373.

176. By the patent, the government is estopped from asserting title to the premises; and if Fremont is estopped from asserting title against defendant, then it would have, by merely occupying the land as public land, rights superior to both, and that, too, in the face of an express prohi-

bition of the sale, by the government, of the mineral lands. *Ib.*

177. A party will, in many instances, be concluded by his declarations or conduct, which have influenced the conduct of another to his injury; but it must appear first, that the party making the admission, by his declarations or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such carelessness and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and fourth, that he relied directly on such, and will be injured by allowing its truth to be disproved. *Boggs* v. *Merced Mining Co.*, 14 Cal. 367; *Mc Cracken* v. *City of San Francisco*, 16 Cal. 626.

See ESTOPPEL.

See ABANDONMENT, ALCALDE, CONVEYANCE, DEED, COMMON PROPERTY, EJECTMENT, GRANT, HOMESTEAD, LEASE MORTGAGE, POSSESSION, USE AND OCCUPATION.

LANDLORD AND TENANT.

1. The entry of a landlord upon his tenant's premises without his consent during the lease, and reletting them, is a discharge of the tenant from his covenants. *Dewey* v. *Gray*, 2 Cal. 377.

2. The relation of landlord and tenant exists where the landlord is an alien nonresident, and is obligatory upon the tenant, and he cannot be allowed to controvert the title of the lessor. *Ramirez* v. *Kent*, 2 Cal. 560.

3. Indebitatus assumpsit for rent will not lie in favor of a stranger for the purpose of trying his title, or by one of two belligerent parties claiming the land, this action depending not upon the validity of plaintiff's title, but upon a contract express or implied. *Sampson* v. *Shaeffer*, 3 Cal. 201.

4. The allegation that the use and occupation of the lot in question was at the request of the defendant, and by the permission of plaintiff, was the allegation of a contract, and this plaintiff is bound to establish, to enable him to succeed. *Ib.*

5. In an action for use and occupation, the court was asked to instruct the jury "that it was necessary to enable the plaintiff to recover, that he should show that the defendant used and occupied the premises by the permission of the plaintiff; but they must find a verdict for the defendant," which the court refused: it was held that in this the court erred. *Ib.*

6. The thirteenth section of the act concerning forcible entries and unlawful detainers, was intended to make the nonpayment of rent work a forfeiture of the estate of the tenant; but the statute must be pursued strictly, and the rent must be demanded on the day it becomes due, and at a late hour of the day. *Chipman* v. *Emeric*, 3 Cal. 283; *Gaskill* v. *Trainer*, 3 Cal. 339.

7. A waiver of demand of rent will never be implied for the purpose of making a forfeiture; for from its very nature, a forfeiture cannot take place by consent and is not favored by the rules of law. *Gaskill* v. *Trainer*, 3 Cal. 340.

8. The right to recover for use and occupation is founded alone upon contract. *O'Connor* v. *Corbitt*, 3 Cal. 373.

9. By the terms of an award which was decisive between a landlord and his tenant, the latter was to leave the premises on the ninth: held, that the plaintiff had no right to give notice to quit until the tenth, and then the plaintiff had six days to remove before the plaintiff could sue for unlawful detention. *Ray* v. *Armstrong*, 4 Cal. 208.

10. The owner of a building leased a portion of it. There was access to the part reserved without going through the part leased, it was held that the lessor had no implied right of way to the part reversed through any portion of the lessee's portion. *Ramirez* v. *Mc Cormick*, 4 Cal. 246.

11. A landlord cannot sue for forcible entry and detainer, in his own name, for unlawful entry upon the possession of his tenant. *Treat* v. *Stuart*, 5 Cal. 114.

12. No action for rent will lie where the possession is adverse and tortious, for

such possession excludes all idea of a contract. *Ramirez* v. *Murray*, 5 Cal. 223.

13. To enable a party to recover rent eo nomine, he must show that the defendant's possession was by virtue of some express or implied agreement. *Ib.*

14. A demand of rent at any time during the term when the same might be due, will be sufficient diligence to hold a party who has guaranteed its payment. *Evoy* v. *Tewksbury*, 5 Cal. 287.

15. Where an action was for restitution of land, and pending the appeal the plaintiff transferred his judgment to a third party and sold the premises to the defendant: held, that the plaintiff's recourse for rent, if he have any, is against the defendant for use and occupation and not upon the appeal bond. *Osborn* v. *Hendrickson*, 6 Cal. 175.

16. Where the plaintiff leased a tract of land claimed by him under a Mexican grant, to defendant, upon condition that he was not to pay any rent for two years, and if the title was confirmed within that time, defendant was to give up his improvements; but if not confirmed in two years, defendant was to remain on until confirmation, with the privilege of buying in case of sale; and if not confirmed, defendant was to hold it as public land; and the defendant at the end of two years took up the tract as public land: held, in an action for the possession and damages, that defendant's improvements erected before, after he thus terminated his tenancy, were only a substitute for the first two years' rent, and that he was chargeable for rent thereafter accruing. *Gunn* v. *Pollock*, 6 Cal. 241.

17. After the forfeiture of the lease by the nonpayment of rent, if the landlord received the rent, he waives the forfeiture and the lease continues. *Barroilhet* v. *Battelle*, 7 Cal. 454.

18. Tenants have a right to remove buildings erected by them at any time before the expiration of their lease, but not after a forfeiture or reëntry for covenant broken. *Whipley* v. *Dewey*, 8 Cal. 38.

19. There is no moral obligation under such circumstances sufficient as a consideration to support a subsequent promise of the landlord to allow the tenant to remove his buildings. *Ib.* 39.

20. Where a landlord agreed to allow his tenant a reasonable time, after the expiration of his lease, to remove his buildings and the tenant surrendered or forfeited his lease before the expiration thereof, the intention of the parties must be confined to its legal expiration and not to the wrongful act of the lessee in terminating it, and the lessee can claim no rights under the contract. *Ib.*

21. A tenant may show that his landlord's title has terminated, or that his attornment was made under mistake of fact or by fraud. *McDevitt* v. *Sullivan*, 8 Cal. 596.

22. When a party rents property of another and he learns afterward that the title of his landlord is disputed, he may at once proceed in the proper mode to settle the question. If he fail to do this, he cannot dispute the title, except in the cases stated, where the title of his landlord has ceased, or when the lease was obtained by fraud. *Ib.* 597.

23. A tenant who puts up machinery for a mill in a house leased, and fastens it by bolts, screws, etc., to the house, has the right to remove it; but as between vendor and vendee, such machinery would be considered part of the realty. *McGreary* v. *Osborne*, 9 Cal. 121.

24. In an action of ejectment, a tenant cannot deny the title of the vendee of his landlord. *McKune* v. *Montgomery*, 9 Cal. 576.

25. Where one of two tenants, holding the household in partnership, purchases the fee in his own name and with his own money, it inures equally to the benefit of the other, to which he becomes entitled on payment of his proportion of the purchase money. *Laffan* v. *Naglee*, 9 Cal. 676.

26. The lessor of plaintiffs is a competent witness in an action of trespass to the leased premises, where the lease does not bind him to protect the plaintiff against trespassers. *McCormick* v. *Bailey*, 10 Cal. 232.

27. A tenant may remove what he had added to the freehold when he can do so without injury to the estate, unless it has become by its manner of addition an integral part of the original premises; but as against a vendor, all fixtures pass to the vendee, even though erected for the purpose of trade and manufacture, unless specially reserved in the conveyance. *Sands* v. *Pfeiffer*, 10 Cal. 264.

28. A tenant, by failing to pay rent when due, forfeits his lease. *Treat* v. *Liddell*, 10 Cal. 303.

29. Where T. & C. executed a joint lease to L. of certain premises, and it was specified in the lease that twenty dollars rent should be paid to T. and twenty dollars to C., and on breach of the terms of the lease on the part of the lessee, T. and C., the lessors, brought a joint suit to recover restitution of the premises and damages for their detention: held, that there was no misjoinder of parties plaintiff. *Ib.*

30. The rule of estoppel, which prevents a tenant from disputing his landlord's title, extends to all persons who enter upon premises under a contract for a lease, and to all persons who, by purchase, fraud or otherwise, obtain possession from such tenant. *Rose* v. *Davis*, 11 Cal. 141.

31. Where a lease contained the usual covenants for rent and reëntry for nonpayment, and provided for the appraisement of improvements erected by the lessee and payment of their value by the lessor at the expiration of the term, and the lessor reëntered for the nonpayment of rent: held, that the lessee could not maintain an action upon being evicted for the value of his improvements. *Lawrence* v. *Knight*, 11 Cal. 303.

32. An executory agreement between a landlord and tenant, that after the title to the premises is settled by a suit to be prosecuted by the former against third persons, the tenant may purchase, does not destroy the relation of landlord and tenant. *Smith* v. *Brannan*, 13 Cal. 114.

33. Possession of a tenant is not notice of his landlord's title. *Smith* v. *Dall*, 13 Cal. 511.

34. *Semble*, if a man sues for rent for January and February, he is not to be denied a right of recovery for either month, simply because he had before sued for rent due in January, which suit was still pending. *Thompson* v. *Lyon*, 14 Cal. 42.

35. A steam engine and boiler fastened to a frame of timber, bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. *Merritt* v. *Judd*, 14 Cal. 69.

36. Such machinery, when applied to quartz leads, is a trade fixture, removable by the tenant if otherwise removable; but this removal can only be during the tenancy and during such further period of possession by the tenant as he holds the premises under a right still to consider himself a tenant, and not during the time he may actually hold possession after his lease has expired. *Ib.*

37. A renewal of a lease terminates the tenant's right to remove fixtures; so with any other agreement which terminates possession under a lease. *Ib.* 72.

38. Although a lessor of land cannot in a given case claim the fixtures, it is otherwise of the mortgagee of the lease. Here the question is between grantor and grantee, and the latter holds all fixtures, whether for trade or manufacture, agriculture or habitation. *Ib.* 73.

39. Where a lease gives the lessee the privilege of purchasing the land at the expiration of the lease on certain terms, the privilege is limited to the whole land, and the lessee, or a purchaser from him of a portion of the land, cannot claim the right to buy that portion. *Hitchcock* v. *Page*, 14 Cal. 443.

40. If the landlord forcibly enter and eject the tenant, the tenant may recover damages for the vegetables and grape vines growing on the land, and planted by the tenant, for sale, he not being permitted to enter and gather them. *Fox* v. *Brissac*, 15 Cal. 225.

41. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance, on the first day of each month. November 1st, 1858, defendant being in possession, denied plaintiff's title, and refused to pay rent. December 23d, 1857, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent; defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers, denying, among other things, plaintiff's title and his own relation of tenant: held, that plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary

to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith* v. *Ogg Shaw*, 16 Cal. 89; 90.

See LEASE, RENT.

LAND COMMISSION OF THE UNITED STATES.

1. A decision of the United States board of land commissioners confirming the title of defendants to the land only amounts to an acknowledgment on the part of the government that it has no claim thereto, and in no way affects the title as between parties. *Brown* v. *Covillaud*, 6 Cal. 474.

2. The confirmation of the title of the city of San Francisco by the board of United States land commissioners and the dismissal of the appeal by the attorney general, have settled that no title to lands within the limits of that city can hereafter be acquired from the United States. *Norton* v. *Hyatt*, 8 Cal. 539.

3. The judgment of the board of land commissioners, the tribunal of original jurisdiction, is sufficient evidence of such confirmation, unless the judgment be reversed, or its operation suspended by an appeal which is still pending. *Sanders* v. *Whitesides*, 10 Cal. 90.

4. A deed of confirmation of a grant of the United States land commission and the United States district court cannot be impeached in an action of ejectment between a party claiming under the grant and a third party. *Rose* v. *Davis*, 11 Cal. 140.

5. The decrees of the board of land commissisners and of the district court are not indispensable to a recovery in ejectment on a grant, but are admissible and conclusive against the government and against those holding by its license or permission. *Gregory* v. *McPherson*, 13 Cal. 572.

6. In ejectment on a Mexican grant, the decree of the land commission confirming it, rendered final by the withdrawal on the part of the United States of any appeal therefrom, and an order of the district court permitting the claimant to proceed thereon as on final decree, are conclusive evidence of the validity of the grant, of its recognition by the United States, and also of the location of the specific quantity granted, the decree in the case confirming the claim under the grant to a particular tract, describing it with specific boundaries. Such a decree and order, in connection with the grant, are as conclusive as to the title of plaintiff as a patent; provided, the premises are within the designated boundaries. *Natoma W. and M. Co.* v. *Clarkin*, 14 Cal. 550.

7. There were pending before the board of United States land commissioners three cases—No. 558, Nos. 45 and 812. The claimants in No. 558 entered into a written agreement with V., the claimant, and B., his attorney of record, in cases No. 45 and 812, by which the former agreed to pay to V. a certain portion of the proceeds of the sales of that portion of the claim No. 558, known as the Miranda claim, the parties agreeing to appoint an agent to go on and make sales. Contemporaneous with this agreement was another between the same parties, by which V. and B. agreed to withdraw and discontinue claims Nos. 45 and 812 before the said board, and alse to cause to be withdrawn the depositions of Theodore Miranda and Francisca Miranda, taken before a commissioner in said case No. 558, and on file therein; and to use their "best endeavors to procure the confirmation of said claim No. 558." B. was the attorney for the Miranda claim, which was for the same land as claim No. 558. To defeat claim No. 558 he acted for the United States law agent in taking said depositions, which were important to the government in defeating claim 558, and he attempted to carry out his agreement to withdraw said depositions—though he was not directly retained by the government. V. and B. sue for the specific execution of the agreement: held, that such agreement is against public policy, and cannot be enforced; that B. could not, without a violation of his duty to government as an attorney, carry out such agreement. *Valentine* v. *Stewart*, 15 Cal. 397.

LAND COMMISSION OF THE STATE.

1. That portion of the act prescribing that no injunction shall be issued against the land commissioners appointed for the sale of the State interest within the water line is invalid. The right of a party to have his title to land protected from a sale which may create a cloud upon it, upheld. *Guy* v. *Hermance*, 5 Cal. 74.

2. The sale of a portion of the beach and water lot property in San Francisco, by the State board of land commissioners, under the act of May 18th, 1853, passed nothing but the state reversionary interest. *Chapin* v. *Bourne*, 8 Cal. 296.

3. The authority of the board of commissioners under the act of May 1st, 1855, relative to a sale of the state's interest in the water line front of the city of San Francisco, as defined by the act of March 26th, 1851, is limited to the property within the boundaries defined by the act; and a sale by them of lots not within these boundaries is a nullity and cannot constitute a cloud of title. Hence an injunction against such a sale will not lie. *Kisling* v. *Johnson*, 13 Cal. 57.

LARCENY.

1. On the trial of an indictment for grand larceny, punishable with imprisonment or death, at the discretion of the jury, a juror was asked by the prosecuting attorney, whether he had any conscientious scruples against the infliction of capital punishment, to which he answered that he would hang a man for murder, but would not for stealing: held, that the juror was not competent. *People* v. *Tanner*, 2 Cal. 258.

2. In cases of grand larceny it was the intention of the legislature that the jury should only assess the punishment when they thought that the defendant deserved the punishment of death, and if they do not agree to such a punishment, then they should find a general verdict. *People* v. *Littlefield*, 5 Cal. 356.

3. A party cannot be convicted of larceny for taking his own property. *People* v. *Mackinley*, 9 Cal. 250.

4. An indictment for larceny describing the money as "three thousand dollars lawful money of the United States," is insufficient. The particular denomination or species of coin must be set forth. *People* v. *Ball*, 14 Cal. 101.

5. An indictment for grand larceny, found at a special term of the court of sessions, is valid, under the statute authorizing that court to hold special terms in certain cases; the court when specially called has the same powers as at a regular term. *People* v. *Carabin*, 14 Cal. 439.

6. Defendant was indicted for stealing a steer. The court charged the jury, in effect, that though defendant killed the steer, believing it to be his own, yet when he appropriated it to his own use and benefit, it was evidence of a felonious intent, and the jury will so find: held, that the charge was erroneous, because it assumes as a fact that defendant did appropriate the steer, which was for the jury, and thus makes the mere fact of appropriation conclusive proof of guilt. *Ib.* 440.

7. An indictment charging defendant with "stealing, taking and leading or driving away," the property stolen, etc., is not defective under our statute as charging the offense in the disjunctive. The gravamen of the offense is taking and removing the stolen property, and it is immaterial whether the asportation be by means of leading the animals stolen or driving them. The offense is complete by the union of either of these acts and the seizure or appropriation. *People* v. *Smith*, 15 Cal. 409.

8. Either leading or driving away horses charged to have been stolen, etc., is a carrying away within the law. *Ib.* 410.

9. An indictment for larceny describing the property as "a black or brown mare or filly, branded with a small mule shoe on the left shoulder," is sufficiently particular in description. To state the color is not necessary, and putting it in the alternative is not a fatal objection, especially when other terms of description are given, which identify the property. Our statute does not require *more* exactness than obtained at common law. *Ib.* 410.

10. Confessions of a defendant indicted

for larceny, made to the prosecutor and owner of the property stolen, upon inducements held out by him that if defendant would disclose his confederates he would use his influence to get defendant acquitted, are not admissible in evidence against him. *Ib.*

11. An indictment for larceny, describing the property stolen as "fifteen twenty dollar pieces, and twenty-five ten dollar pieces, and ten five dollar pieces, of the gold coin of the United States, of the value of five hundred and fifty dollars," is not defective, as not averring the value of each particular piece of coin. *People* v. *Green*, 15 Cal. 513.

12. To convict a defendant of larceny upon the testimony of an accomplice, together with corroborating evidence, the corroborating evidence must connect the defendant with the offense charged. It is not sufficient that it corroborates the accomplice as to the fact that a larceny was committed. *People* v. *Eckert*, 16 Cal. 112.

13. McB., the accomplice, swore to the larceny by the defendant. The court instructed the jury, "that though the witness McB. was impeached, if his testimony was corroborated by the testimony of witnesses unimpeached, they were bound to believe his testimony:" held, that the instruction was wrong, as taking from the jury their right to judge of the credibility of all the statements of the witness. *Ib.*

14. Defendant owed B., and to secure the debt, made a bill of sale to him of a wagon and team, and delivered possession. Bill of sale absolute on its face; but there was an agreement between defendant and B., that B. should keep the property until the profits thereof had paid him about $1,000, or until he had been otherwise paid, when the property was to be delivered back to defendant. After this, L., a teamster of B., was directed by him to drive a horse and mule of the team in a wagon to a mill in the neighborhood. L. drove the team to Sacramento, instead of the mill. Creditors of defendant there levy on the wagon and animals. Defendant is indicted for larceny; and, after proof on the trial seeking to connect him with driving the team to Sacramento, and its seizure there, he offered to go into a statement of accounts between himself and B., to show that the debt to B. had been paid before L. took the property. Ruled out, on the ground that this matter "must be settled in another court:" held, that the court erred; that the facts sought to be introduced were competent, as tending to explain the transaction, and show the intent with which defendant took the property, or as showing whose property it was, or the general or particular title to it; that all the facts connected with the title and the taking should go to the jury, who can try the question whether the indebtedness had been paid. *People* v. *Stone*, 16 Cal. 371.

15. Larceny is compounded of the taking and carrying away, and the felonious intent. Whatever has a legal tendency to show the intent is proper evidence. *Ib.*

16. A man may steal his own property, if by taking it his intent be to charge a bailee with the property, and thus impose a loss upon him. *Ib.*

See CRIMES AND CRIMINAL LAW, INDICTMENT, STOLEN GOODS.

LAYDAYS.

1. In the absence of any custom to the contrary, Sundays are computed in the calculation of laydays at the port of discharge; but where the contract specifies working laydays, Sundays and holidays are excluded in the computation. *Brooks* v. *Minturn*, 1 Cal. 483.

See ADMIRALTY.

LEASE.

I. IN GENERAL.

1. A priest had no authority to lease lands appertaining to the missions after the cession of California to the United States,

and a title thus derived is invalid. *Brown* v. *O'Connor*, 1 Cal. 419.

2. In an action by a lessor against two subtenants of the lease, when it appears that the subtenant did not occupy any portion of the premises jointly, it was held that a several and not a joint judgment would be proper. *Pierce* v. *Minturn*, 1 Cal. 471.

3. Where the value of the premises was agreed upon, the offer of the defendant to prove that he could not rent them was properly refused. *Lord* v. *Sherman*, 2 Cal. 502.

4. Where the defendant leases a store and certain stands for the sale of goods, which stands were erected on the sidewalk of the public street, and were shortly afterwards removed by police regulation, this is no eviction, as it was a mere privilege, and the lessee should have protected himself with covenants. *McLarren* v. *Spaulding*, 2 Cal. 513.

5. A lessee admits the authority of his lessor by taking a lease, and no averment of the lessor's right to lease is necessary as against him. *Morse* v. *Roberts*, 2 Cal. 516.

6. A lease for two years executed by the lessees, and by an agent of the lessors, but who had no written authority to do so, is within the statute of frauds. *Folsom* v. *Perrin*, 2 Cal. 604.

7. Plaintiff and defendant took a joint lease for improving certain property. Plaintiff, at the instance and request of the defendant, furnished the necessary funds on interest, and the defendant drew the contract. Plaintiff sued to recover the half portion of the outlay: held, that the improvements were not made at plaintiff's own risk. *Young* v. *Polack*, 3 Cal. 211.

8. Where the petition set forth a lease and contract to pay rent in kind, and a refusal to pay, and an intent to defraud plaintiff of his rent by removing the crop, and a prayer for an injunction: held, that the complaint must aver the insolvency of the defendant or an inability to realize the rent by attachment or execution. *Gregory* v. *Hay*, 3 Cal. 334.

9. The surrender of a leasehold estate operates as a merger in the fee, but this cannot be suffered to defeat the right of a third party, whose rights intervened before the merger took effect. *Gaskill* v. *Trainer*, 3 Cal. 340.

10. A party holding a lien on a leasehold estate has a right to enforce it, notwithstanding a subsequent failure of the lessee to pay rent and, a surrender of the lease to the lessor. *Ib.*

11. The nature of an interest to be sold under a decree of sale is sufficiently ascertained by a lease which is referred to and described in the decree. *Ib.*

12. Improvements made by an owner of property after the surrender of a lease by a tenant, upon whose leasehold interest a mechanic's lien had previously attached, can no more impair the lien than if made by the tenant himself. *Gaskill* v. *Moore*, 4 Cal. 235.

13. A clause in a lease exempting the tenant from liability to restore the house in case it should be destroyed by fire, does not release him from paying rent in case of such destruction. *Beach* v. *Farish*, 4 Cal. 340.

14. The premises were leased for six years, and the lessees were to build a wharf on the land, but stipulated for no particular time: held, that the lessor, before the expiration of the term, could have no legitimate cause of complaint. *Ib.*

15. A covenant "to let the lessor have what land he and his brothers might want for cultivation" cannot be enforced for uncertainty. *Ib.*

16. A covenant for a lease to be renewed indefinitely at the option of the lessee, is in effect the creation of a perpetuity, and is against the policy of the law. *Morrison* v. *Rossignol*, 5 Cal. 65.

17. Where a clause of renewal in a lease discloses no certain basis for the ascertainment of the rent to be paid, such clause will be held void for uncertainty. *Ib.*

18. A executed a lease to B, and at the time of the execution C wrote underneath it, "I hereby agree to pay the rent stipulated above, when it shall become due, provided that the said B does not pay the same: held, that the agreement of C being added as an agreement running with the lease and executed at the same time, it must be considered as a part of the lease itself, and not within the statute of frauds. *Evoy* v. *Tewksbury*, 5 Cal. 286.

19. If a party leases from another a tract of land for agricultural purposes, upon which there is a mine, any irreparable injury to the mine would not affect his estate, but the injury would be to the estate of the landlord, and the remedy in

respect to that injury must be sought by the latter. *Merced Mining Co.* v. *Fremont*, 7 Cal. 327.

20. Where plaintiff leased a lot to B. for ten years, at a monthly rent payable monthly; at the end of the term, B. to have two-thirds of the appraised value of the house to be by him erected, and the lease also contained this clause: "And it is further agreed, that the brick house now being built shall always be and remain as the same is hereby declared to be, mortgaged as security for the payment of the monthly rent herein stipulated:" held, that it was a mortgage and that it might be foreclosed on the nonpayment of the first or any month's rent. *Barroilhet* v. *Battelle*, 7 Cal. 452.

21. Where the lessee completed the business and subsequently mortgaged the lease to T., and then assigned the lease to T. for further security, and T. entered as tenant and paid rent, there being back rents due from the original lessee: held, that T. was bound to know the terms of the lease and the mortgage therein contained; that plaintiff had a right to foreclose, and sell the reversionary interest of the original lessee, to wit: two-thirds of the value of the house at the end of the term; that T., provided she paid the rent, would have the right of possession until the end of the term, the acceptance of rent from her having waived the forfeiture of the lease. *Ib.* 454.

22. A party holding under an assignment of a recorded lease containing a mortgage clause, is bound to know the contents thereof, and is therefore subject to the mortgage, although the instrument is recorded in the book of leases, there being a privity of estate. *Ib.*

23. Tenants have a right to remove buildings erected by them at any time before the expiration of their leases, but not after a forfeiture or reëntry for covenant broken. *Whipley* v. *Dewey*, 8 Cal. 38.

24. Admitting that the landlord had agreed to allow the plaintiff to remove after the expiration of the lease, the intention of the parties must be confined to the legal expiration thereof, by its own limitation, and not by the wrongful act of lessees terminating the same. *Ib.* 39.

25. Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: held, that the purchaser under the mortgage sale can require the tenant to pay the rent over again to him. *McDevitt* v. *Sullivan*, 8 Cal. 596.

26. A covenant in a lease to the lessee, his heirs and assigns for a term of eight years, that if the lessee shall sell or dispose of the demised premises the lessee is to be entitled to the refusal of the same, is a covenant running with the land. *Laffan* v. *Naglee*, 9 Cal. 676.

27. Every covenant in the lease relating to the thing devised attaches to the land and runs with it. *Ib.* 677.

28. Where one of two holders of the leasehold holding in partnership purchases the fee in his own name and with his own money, it enures equally to the benefit of the other, to which he becomes entitled on payment of his proportion of the purchase money. *Ib.* 678.

29. Where T. and C. executed a joint lease of certain premises, and it was specified in the lease that twenty dollars rent should be paid to T., and twenty dollars to C., and on breach of the terms of the lease on the part of the lessee, T. & C., the lessors, brought a joint suit to recover restitution of the premises and damages for their detention: held, that there was no misjoinder of parties plaintiff. *Treat* v. *Liddell*, 10 Cal. 303.

30. A tenant, by failing to pay rent when due, forfeits his lease. *Ib.*

31. The validity of a lease under which a lessee of a State's prison held the prisoners cannot be tried in an action of forcible entry and detainer, nor can the lessee be deprived of the advantages resulting from the possession of the premises under the lease, by a forcible ouster under legislative enactment. *Mc Cauley* v. *Weller*, 12 Cal. 528.

32. The purposes for which premises are leased cannot alter the nature of the leasehold interest as property. *Ib.*

33. Whether a lease gives the lessee the privilege of purchasing the land at the expiration of the lease on certain terms, the privilege is limited to the whole land, and the lessee, or a purchaser from him of a portion of the land, cannot claim the right to buy that portion. *Hitchcock* v. *Page*, 14 Cal. 443.

34. A steam engine and boiler fastened to a frame timber, bedded in the ground of a quartz ledge sufficient to make it level,

with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. *Merritt* v. *Judd*, 14 Cal. 69.

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36. A renewal of a lease terminates the tenant's right to remove fixtures; so with any other agreement which terminates possession under a lease. *Ib.* 72.

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38. A landlord has no right to enter for a breach of covenant in the lease, and forcibly eject the tenant, the lease reserving no right of entry for such breach. *Fox* v. *Brissac*, 15 Cal. 225.

39. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third persons, whether the agent had any written authority or not. *Minturn* v. *Burr*, 16 Cal. 109.

40. Where a lease of a lot in San Francisco, for ten years, stipulated that the lessee should place "on said premises a building thirty by eighty feet, which has been shipped from the port of New York, to be put up immediately on arrival; or if lost, a similar one is to be ordered, got up, and put up in the shortest possible time," and also, in a final clause, that if no agreement was made between the parties for a renewal of the lease for a further period, "then the valuation of the *buildings* is to be made by three disinterested persons," etc., and the lessor was to pay to the lessee the amount agreed on; and the lessee erected a building worth about $1,000, which was burned, and then another similar one, and subsequently sublet the premises to plaintiff, who put up a valuable building, costing $50,000 — defendants, who had bought the lot, notifying him, before he erected his building, that they would not pay for it: *Held*, that at the expiration of the term, defendants were not bound to pay plaintiff for his improvements; that the term "*buildings*," though in the plural, refers to the building mentioned in the fore part of the lease, and not to any buildings the lessee might erect — especially when the conduct of the parties, the nature of the transaction, and the surrounding circumstances are considered. *Woodward* v. *Payne*, 16 Cal. 448.

41. The terms of this lease so construed as to give completeness to the agreement, and to make it a just, fair, and equitable contract, mutually obligatory in its essential provisions, instead of a one-sided and unreasonable contract. *Ib.*

42. A power of attorney, authorizing the agent Schoolcraft to "superintend my real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way, real or personal, whatsoever, giving my said attorney full power to use my name, release others, or bind myself, as he may deem proper and expedient, hereby making the said Schoolcraft my general attorney and agent, and by these presents ratifying whatsoever my said attorney may do by virtue of this power," gives the agent power to execute a lease of real estate, containing a clause that the lessee "shall have the privilege of purchasing any part of said land during the continuation of this lease, at its value, in preference to any other person. *De Rutte* v. *Muldrow*, 16 Cal. 512.

43. Where a lease gives the lessee the privilege of purchasing the land during the lease, at its value, in preference to others, this privilege is as much a term of the contract, and binding on the lessor, as any other term of the instrument; and though the lessee be not bound to purchase, and the lessor's contract may amount only to a proposition, until accepted by the lessee, yet, upon his acceptance, it becomes a valid agreement. *Ib.*

44. Where a lease contains such privi-

lege in favor of the lessee to purchase, he has an equity as against his lessor to have the agreement executed. *Ib.*

45. M. had a lease, dated December, 1849, from Sutter, through his agent, S., containing a clause of purchase of the land during the lease. April, 1850, M. received a letter from Sutter, directed to S., his agent, and M., in which Sutter stated that he had sold to M. the land in dispute for $2,800, two hundred dollars of which had been paid, and the balance was to be paid in three equal payments of six hundred dollars, for which M. was to execute his notes, and reform the lease so as to relinquish his right to purchase the balance of the land leased; that M. was to have a bond for forty acres of the land, and the balance of the land he was to have at any time during the continuation of the lease, upon the payment of eight hundred dollars additional; that M. then and there executed the three notes for six hundred dollars each, and S., as the attorney of Sutter, executed and delivered to M. a bond for the forty acres, and changed and reformed the lease. M. took possession of a portion of the land on the execution of the original lease. Prior to October 22d, 1850, M. paid the $2,800, and Sutter, by his then attorney, F., executed to M. a deed for the land in dispute. Plaintiffs received from Sutter a deed of the land, dated May 3d, 1850, made in pursuance of an agreement between the parties, dated January 26th, 1850. Plaintiffs also had another deed from Sutter, dated November 20th, 1850. When plaintiffs purchased, they had notice of M.'s equity and interest in the land: held, that this letter constituted a valid agreement as to the land, and, when taken in connection with the execution of the agreement by the deed of Sutter to M., by his agent, F., in April, 1850, with the possession of the premises by M., notice to plaintiffs of M.'s rights makes out an equitable title in M. sufficient to defend in ejectment by plaintiffs. *Ib.* 513.

46. The fact that such letter had no date is not essential, either by Spanish or common law, to make the letter a perfect agreement. The transaction being closed by F. a day or two subsequently, and the notes of M. taken in execution of the agreement, the omission as to date could be supplied by the notes. *Ib.*

47. Where land is described in a lease as "land lying along the American fork, bounded by said fork, and running down to land owned by Mark Stewart; thence easterly and north-easterly along a slough to the north of A street, and following the bank of said slough around to where the high land slopes to said American fork," etc., the true construction of this description fixes the boundary on the slough, and the words "around where the high land slopes," if they have any meaning at all, can only be applied to the bank or high ground adjoining the slough. *Ib.* 514.

48. *Query:* Whether a leasehold estate for a term of years is property in such sense that a judgment docketed becomes a lien thereon. *McDermott* v. *Burke*, 16 Cal. 589.

49. A mortgagor cannot make a lease which will bind his mortgagee, where the lessee, at the time, has actual or constructive notice of the mortgage. *Ib.*

50. The interest of the lessee, in such case, depends for its duration— except as limited by terms of the lease— upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and, in this State, against the mortgagee; but with its enforcement, the leasehold interest is determined, even though the lessee be not made a party to the foreclosure suit. *Ib.*

51. There is no privity of contract or estate between the purchaser upon the decree of sale on foreclosure and the tenant of the mortgagor. The purchaser may treat the tenant as an occupant without right, and maintain ejectment for the premises— except where the purchaser is precluded, by his acts or declarations, from thus treating him. *Ib.*

52. The purchaser cannot, for the want of privity, count upon the lease, and sue for the rent or the value of the use and occupation. The relation between the purchaser and tenant is that of owner and trespasser, until some agreement, expressed or implied, is made between them with reference to the occupation. The tenant is not bound to attorn to the purchaser, nor is the latter bound to accept the attornment, if offered, unless the acts or declarations of the purchaser, anterior to the purchase, qualify the subsequent relation of the parties, or the rights springing from it. *Ib.*

53. There are cases where the purchaser on a sale under a decree of foreclosure would be estopped from treating the tenant of the mortgagor as a trespasser; as, for instance, when the lease was taken upon the encouragement of the mortgagee, and the purchaser was cognizant of the fact at the time of his purchase. *Ib.*

54. A tenant of the mortgagor is not interested either in the claim secured nor in the estate mortgaged—that is, in the title pledged as security. He has not succeeded to such estate, or to any portion of it. He does not stand in the position of a purchaser. The estate remains in his lessor; he has only a contingent right to enjoy the premises. The right of the lessor to the possession ends with the deed by which the sale of the premises is consummated; and the tenant's right to possession depends upon that of the lessor, and goes with it; and the tenant having notice, actual or constructive, of the mortgage, need not be made party to the foreclosure. *Ib.* 590.

55. Possibly, a court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold on foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *Ib.*

56. But the tenant has no such absolute right, from the mere fact of his tenancy, as to require him to be a party to the foreclosure, in order to vest the legal title in the purchaser under the decree. *Ib.*

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2. *Assignment of a Lease.*

57. An assignor of a leasehold estate, who has parted with his whole interest therein, is liable for the rents and profits of the premises after the assignment, from the single fact that the assignee has continued to occupy them. *Gunter* v. *Geary*, 1 Cal. 475.

58. It is questionable whether a breach of a covenant not to assign a lease would be enforced so as to produce a forfeiture. It is in restraint of alienation, and therefore against the policy of the law. *Chipman* v. *Emeric*, 5 Cal. 51.

59. The assignment of a lease as collateral security for the payment of a debt does not vest the estate in the assignee until a breach of the agreement; and an assignee is only entitled to the reversion by privity of estate, or the actual occupation and beneficial enjoyment. *Engles* v. *McKinley*, 5 Cal. 154.

60. A conveyance by a lessee of the remainder of his unexpired term, though it employs words ordinarily used in a demise, and contains a reservation of rent, and the right of reëntry upon covenants broken, is not an underletting or sublease, but is considered in law as an assignment of his whole interest, as there remains in him no reversion of the estate. *Smiley* v. *Van Winkle*, 6 Cal. 606.

61. The valuable privilege of preëmption attached to a lease belongs to the whole property, and is therefore assignable. *Laffan* v. *Naglee*, 9 Cal. 677.

62. The assignee of a lease may discharge himself from all liability under the covenants of the lease by assigning over; and the assignment over may be to a beggar, or a femme covert, or a person on the eve of quitting the country forever, provided the assignment be executed before his departure; and even though a premium be given as an inducement to accept the transfer. *Johnson* v. *Sherman*, 15 Cal. 292; *People* v. *Brooks*, 16 Cal. 25.

63. If some of the covenants of the lease do not bind the assignee, the State cannot have relief on that ground; she can claim no greater exemption than an individual from the consequences of an unwise contract. *State* v. *McCauley*, 15 Cal. 457; *People* v. *Brooks*, 16 Cal. 25.

64. The act of March, 1856, having authorized the commissioners to execute a lease of the State prison, without prescribing any specific form, or containing any restrictions as to assigning; and the lease being in its terms assignable, and no objections to this form of contract having been made at the time, it is too late to interpose them after the contract has been acted upon on both sides, and thus adopted and approved. The personal liability of the assignor continued after his assignment. The security of his bond was not impaired thereby. *State* v. *McCauley*, 15 Cal. 457; *People* v. *Brooks*, 16 Cal. 25.

See LANDLORD AND TENANT, RENT.

LEGACY.

1. The taking of a legacy by the wife under the will of the husband will not prevent her from contesting the validity of the will, so far as it disposes of the half interest in the common property of others. *Beard* v. *Knox*, 5 Cal. 257.

2. A legatee who has been represented by counsel at the allowance of accounts against the estate will not be allowed, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence. *Williams* v. *Price*, 11 Cal. 213.

3. Bill filed by a judgment creditor of J. upon an order of court permitting it against defendants as executors. Bill avers that the will of deceased directed, by written or oral instructions, the executors to sell certain cattle, and retain the proceeds for the use and benefit of J., after first discharging his then debts. That it also declared that he, the testator, had made a secret assignment for J., which the executors would carry into effect according to his instructions when convenient. Bill charges that defendants have not sold the cattle, but have converted them to their own use: held, that a demurrer was properly sustained; that a pleading must be taken most strongly against the pleader; and that there is no law giving effect to an oral instruction of a testator as a will or part of a will; and that the creditor of J. can have no more rights than J. himself. At most, J. is only a legatee, and the executors of the trustees of the legacy; and the bill not stating that the estate is settled, nor that the property or the money is not necessary to pay off the debts or expenses of administration, nor that J. would be entitled before final settlement to his legacy without tendering a refunding bond, cannot be maintained. *Sparks* v. *De la Guerra*, 14 Cal. 111.

See Administrator, Estates of Deceased Persons, Probate Court, Will.

LEGISLATURE.

See Construction of Statutes, III.

LEVY.

See Attachment, V; Execution, III.

LEX LOCI.

1. Personal property beyond the limits of this State assigned in trust to pay the creditors of the assignor, the assignor and assignee both residing and being at the time in the foreign jurisdiction where the property was, and possession being taken by the latter vests in the assignee according to the lex loci, and his title will be maintained here against creditors of the assignor. *Forbes* v. *Scannell*, 13 Cal. 278.

LIBEL AND SLANDER.

1. It was error for the court to instruct the jury that when a person injuriously slanders the title of another, malice is presumed. *McDaniel* v. *Baca*, 2 Cal. 338.

2. If the circumstances raise a strong presumption that fraud has been perpetrated in getting possession of an estate, there is no malice accompanying a publication of caution to the public in the purchase thereof. *Ib.*

3. In action for slander, where words are charged to have been spoken of and concerning a defendant, as a clerk or tradesman, which it is alleged was his profession, it is unnecessary to allege special damages. *Butler* v. *Howes*, 7 Cal. 89.

4. In action for an alleged libel, a variance between the date of the libel as set forth in the complaint, the twenty-third of June, and the date as shown in the evidence—the twenty-fourth of June is not material unless the defense is misled by it. *Thrall* v. *Smiley*, 9 Cal. 536.

5. To constitute a justification, in an action for a libel, the answer must aver the truth of the defamatory matter charged. It is not sufficient to set up facts which only tend to establish the truth of such matter. Without an averment of its truth, the facts detailed can only avail in mitigation of damages. *Ib.*

6. In an action for slander for words spoken in the presence and hearing of the plaintiff, and immediately after the defendant had uttered the slanderous words the plaintiff replied to them, which reply the plaintiff offered to prove on the trial, and the court refused to hear such proof: held, that such ruling of the court was error, as the reply might have qualified or explained the slanderous words, or shown in what sense they were uttered, or might have even admitted their truth. *Bradley* v. *Gardner*, 10 Cal. 372.

LICENSE.

1. The State has the power to require the payment by foreigners of a license fee for working the gold mines in this State. *People* v. *Naglee*, 1 Cal. 242.

2. The statute of California authorizing the granting of license to keep a gambling house, should not be construed as conferring the right to sue for a gaming debt, but as a protection solely against a criminal prosecution. *Bryant* v. *Mead*, 1 Cal. 444.

3. The fact that the parties in possession of a gold mine are foreigners, and have not obtained a license, affords no apology for trespassers. The State alone can enforce the law prohibiting foreigners from working in the mines without a license. *Mitchell* v. *Hagood*, 6 Cal. 148.

4. A ferry-license being a franchise is not the subject of levy and sale under execution. *Thomas* v. *Armstrong*, 7 Cal. 287.

5. An act of the legislature authorizing boards of supervisors to appoint a collector of foreign miners' license is not unconstitutional. Assessors and tax collectors are constitutional officers; but it is not necessary under the thirteenth section of article eleven of the constitution, that every portion of the revenue pass through their hands. The legislature may authorize the tax-payer to pay his taxes directly into the treasury. *People* v. *Squires*, 14 Cal. 16.

6. The foreign miners' license, though in some sense a tax, yet probably it is not so in the sense involved in the necessary duties of a tax collector, as a tax on land or personal property. *Ib.*

7. The statement of the existence of a general license from the United States to work the mines which the public lands contain is inaccurate as applied to the action, or rather, want of action of the government. There is no license in the legal meaning of that term. A license to work the mines, implies a permission to extract and remove the metal. Such license from an individual owner can be created only by writing, and from the general government only by act of Congress. But Congress has adopted no specific action on the subject, and has left that matter to be controlled by its previous general legislation respecting the public domain. The supposed license from the general government consists in its simple forbearance. *Boggs* v. *Merced Mining Co.*, 14 Cal. 374.

See BRIDGES AND FERRIES, FRANCHISE, WHARF.

LIEN.

I. In general.

1. An attorney has no lien upon a judgment recovered by him in favor of his client for a quantum meruit compensation for his services; such lien extends only to costs given by statute. *Ex parte Kyle*, 1 Cal. 332; *Mansfield* v. *Dorland*, 2 Cal. 509; *Russell* v *Conway*, 12 Cal. 103.

2. Where the estate of an insolvent is subject to liens or mortgages created before the application in insolvency, proceedings therein do not affect such liens or mortgages, and the right of the assignees is confined to the surplus. *Rix* v. *McHenry*, 7 Cal. 92.

3. If the purchasers from parties alleged to have been insolvent, bought in good faith, it is immaterial how many valid prior liens may have attached on the property; they are entitled to what remains after the liens are satisfied; or they would have a right to pay the liens and keep the property; and a court of equity would not interfere in such a case. *Kinder* v. *Macy*, 7 Cal. 207.

4. The true theory of our probate system is that both the real and personal estate of the intestate vest in the heir, subject to the lien of the administrator for the payment of debts and the expenses of administration, and with the right in the administrator of present possession. *Beckett* v. *Selover*, 7 Cal. 231; *Haynes* v. *Meeks*, 10 Cal. 120.

5. A lien having attached to property in the hands of a receiver, follows it in the hands of a successor appointed by the court. *Adams* v. *Woods*, 9 Cal. 29.

6. Where a mortgage upon a homestead is executed, without the wife joining in the execution, it has no validity as a lien upon the premises to the exemption of $5,000. *Moss* v. *Warner*, 10 Cal. 297.

7. Where a mortgagee released a mortgage made by two parties, and took a new mortgage made by one to whom the other had meanwhile sold, the mortgage being for a less sum by five hundred dollars, paid at the time, and bearing a different rate of interest, it will require clear evidence of fraud to induce a court of equity to interfere and give the mortgage priority over intervening liens. *Dingman* v. *Randall*, 13 Cal. 514.

8. The lien of firm creditors is paramount to the lien of individual creditors upon the firm property. *Conroy* v. *Woods*, 13 Cal. 632.

9. A tender of the money due on a bond and mortgage, after the law day of the mortgage, and a refusal to accept the money do not discharge the lien of the mortgage. *Perre* v. *Castro*, 14 Cal. 528.

10. Where plaintiff obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them and the decree being in the usual form for the amount due, sale of the premises, application of the proceeds and execution against the property of the husband for any deficiency; and after the entry of the decree the husband died: held that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency. The decree binds the specific premises mortgaged, and the property passed into the hands of the executrix of the husband's estate subject to its lien, she took what remained after the lien was satisfied. *Cowell* v. *Buckelew*, 14 Cal. 641.

11. A party erecting buildings upon the property of an infant, under contract with his guardian, made without authority of law, has no equitable lien on the property for the value of the improvements—such party being fully informed of the title and condition of the property. *Guy* v. *Du Uprey*, 16 Cal. 200.

12. A decree in insolvency, discharging the husband and setting apart to him certain premises as a homestead, does not discharge or impair the lien of a mortgage thereon previously executed by the husband. The mortgagee has vested rights which could not thus be divested; nor was such the intention of our insolvent act. *Bowman* v. *Norton*, 16 Cal. 218.

II. In Admiralty.

13. The master of a ship has a lien on the cargo for the freight, and is not bound to deliver to a consignee any part of the goods specified in a bill of lading until the whole freight is paid; and an offer to give good security for the payment of the freight is not sufficient to compel a delivery by the master. *Frothingham* v. *Jenkins*, 1 Cal. 44.

14. Possession is always essential to the existence of a lien. It is the right which one has to retain that which is in his possession belonging to another, until certain demands of the person in possession are satisfied. *Lineker* v. *Ayeshford*, 1 Cal. 80.

15. Where the vendor ships goods to his own order, that he might retain a lien on them until the price of the sale of them to the purchaser be paid, and the master of the ship delivers them, nevertheless, to the purchaser: held, that the vendor can recover of the master his interest in the goods—that is, the price for which the goods were sold with the interest. *Persse* v. *Cole*, 1 Cal. 370.

16. A right to detain goods until the freight is paid by reason of the lien of the owner, grows out of the usage of trade. *Brown* v. *Howard*, 1 Cal. 424.

17. Where it appears clearly from a charter party that the intention of the owner of a ship and the charterer is, that the former shall have no lien on the freight but shall give a personal credit to the charterer, the former loses his right of lien on the cargo and can look only to the personal responsibility of the charterer for payment of the hire of the vessel. *Ib.*

18. One part owner of a vessel has no lien on the shares of the other part owners for his advances and disbursements. *Sterling* v. *Hanson*, 1 Cal. 480.

19. The owner of a chartered vessel has no lien upon the cargo for the charter price. *Mayo* v. *Stansbury*, 3 Cal. 467.

III. By Attachment.

20. The remedy by attachment is not a distinct proceeding in the nature of an action in rem, but is an adjunct, or a proceeding auxiliary to the action at law, designed for the purpose of securing the property of the debtor to answer the judgment which may be obtained. *Low* v. *Adams*, 6 Cal. 281.

21. A lien by attachment enables a creditor to file a creditor's bill without waiting for judgment and execution. *Heyneman* v. *Dannenberg*, 6 Cal. 379; *Scales* v. *Scott*, 13 Cal. 78; *Conroy* v. *Woods*, 13 Cal. 633.

22. A fund in the possession of a receiver can only be distributed by order of the court in whose custody it is; and no party can by adverse procedure acquire a lien on such funds. *Adams* v. *Hackett*, 7 Cal. 205.

23. As soon as a vessel is seized by service of process in a court of admiralty, a lien attaches in favor of the party at whose suit the seizure is made; it is not necessary that the vessel should be attached. *Meiggs* v. *Scannell*, 7 Cal. 408; *Fisher* v. *White*, 8 Cal. 423.

24. Every sale of property and personal chattels is good as between the parties, and cannot be attacked for fraud, except by a creditor who had obtained a lien by judgment and taken out execution which has been returned unsatisfied in whole or in part, and where the statute gives a lien upon a seizure by attachment. *Thornburg* v. *Hand*, 7 Cal. 565.

25. The lien of attachment having become fixed upon funds in the hands of a receiver, follows the property in the hands of his successor. *Adams* v. *Woods*, 9 Cal. 29.

26. The lien of an attachment takes effect immediately upon the fulfillment of the statutory provisions, and cannot be divested by a failure of the sheriff to make a proper return. *Ritter* v. *Scannell*, 11 Cal. 249.

27. A deposit in the recorder's office of a writ of attachment, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. *Ib.*

28. Such a lien cannot be divested by the failure of the sheriff to make a proper return of the writ. *Ib.*

29. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud had been discovered. The prior attachments became liens, in the nature of a legal estate vested in the sheriff for the benefit of the creditors. *Patrick* v. *Montader*, 13 Cal. 444.

30. The lien of firm creditors must be preferred to the lien of an individual creditor of the remaining partner attaching first. *Conroy* v. *Woods*, 13 Cal. 631.

31. Plaintiff, January 10th, 1858, in a

suit entitled " C. *v.* M. and others, composing the Wisconsin Quartz Mining Co.," a corporation, attached a quartz mill and ledge belonging to the corporation. June 26th, 1858, the complaint was amended, so as to make the corporation, as such, the party defendant, and judgment was rendered against the company, August 14th, 1858, the property sold, and plaintiff the purchaser. October, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure August 9th, 1858, sale October following, W. the purchaser. Defendants here are in possession, under sheriff's sale on the decree. Plaintiff claims title under his judgment and sale: held, that he cannot recover; that he acquired no lien by his attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ; that plaintiff's rights attach only from the date of his return of the judgment, August 14th, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9th, 1858, under which defendants claim, the latter have the better right. *Collins* v. *Montgomery*, 16 Cal. 403.

IV. Of a Judgment.

32. A conveyance which would come within the statute of frauds if made by an individual, if made by a corporation would be liable to the same construction; and if void in the former case, would be void in the latter, and will not affect the lien of a judgment regularly obtained against the grantor. *Smith* v. *Morse*, 2 Cal. 552.

33. A conveyance made without authority will not affect the lien of a judgment. *Ib.* 556.

34. An appeal from a judgment suspends the lien, which is merely an incident; and the statutory limitation of a lien commences to run only from the date of the remittitur from the appellate court. *Dewey* v. *Latson*, 6 Cal. 134.

35. The perfecting an appeal does not release the lien acquired by docketing the judgment. *Low* v. *Adams*, 6 Cal. 281.

36. The judgment debtor cannot set up errors in docketing the judgment as destroying the lien, when the property has been sold on execution under the judgment; if the property sold is his, the levy operates as a lien; if not, he has no right to complain. *Ib.*

37. The issuing and levy of an execution before the lien of a judgment upon which the execution issues expires, will not operate to prolong the lien of the judgment beyond the time limited in section two hundred and four of the code. *Isaac* v. *Swift*, 10 Cal. 81.

38. The payment by a judgment debtor of the judgment, after a sheriff's sale, extinguishes the lien; and the fact that he takes the transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. *Mc Carty* v. *Christy*, 13 Cal. 81.

39. To entitle a judgment creditor having a lien to redeem, he must serve upon the officer a copy of the docket of the judgment. A copy of the judgment is not sufficient. *Haskell* v. *Manlove*, 14 Cal. 57.

40. The statutory lien of a judgment upon the real estate of the judgment debtor can attach only upon property in which such debtor has a vested legal interest. *People* v. *Irwin*, 14 Cal. 438.

41. A judgment recovered against the husband does not become a lien on the homestead, and a sale of the homestead upon an execution issued on such judgment is void. *Ackley* v. *Chamberlain*, 16 Cal. 183.

42. The lien of a judgment is purely the creature of statute, and in this State the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court. *Ib.* 183.

43. In this State, a judgment cannot become a lien upon the homestead. It can become a lien only upon the real property of the judgment debtor. *Bowman* v. *Norton*, 16 Cal. 220.

44. If an undertaking on appeal to the supreme court be insufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing; and this where the undertaking was excepted to, there being no effort to enforce the

judgment pending the appeal. *Chapin* v. *Broder*, 16 Cal. 420.

45. Section two hundred and forty-six of the practice act authorizes, in foreclosure suits, a personal judgment against the mortgagor, in addition to the relief usually granted; and such personal judgment, when docketed, becomes a lien. But the mere contingent provision, for execution, in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as a judgment lien, until the amount of the deficiency to be recovered has been ascertained and fixed. In this latter case, the limitation upon the lien does not commence to run until the deficiency be ascertained, and an execution can be issued therefor. *Ib.*

46. Where costs, on appeal to the supreme court, are not entered on the judgment docket in the court below, they do not become a lien on property until the levy of an execution. *Ib.*

47. Query: whether a leasehold estate for a term of years is property in such sense that a judgment docketed becomes a lien thereon. *McDermott* v. *Burke*, 16 Cal. 589.

V. Of a Vendor.

48. A vendor has a lien on the land sold for the purchase money unless he has taken security for its payment, though he has executed the conveyance. *Salmon* v. *Hoffman*, 2 Cal. 142.

49. The lien which springs out of the title bond predicated upon the covenants for the purchase money, attaches to the land unless expressly reserved, and if such reservation is made it lies upon the purchaser to show that the vendor agreed to rest on other security. *Truebody* v. *Jacobson*, 2 Cal. 286.

50. When a vendor of real estate makes a conveyance, but gives no bond conditioned for the execution of a conveyance on payment of the purchase money by the vendee, he has an equitable lien on the land for the purchase money, and holds the legal title as a security for the enforcement of the lien. *Gouldin* v. *Buckelew*, 4 Cal. 111.

51. A failure of the vendee to pay the purchase money for two years does not forfeit his right under the contract, and the vendor may enforce payment at any time after due; and if the vendor, under power of sale reserved in the contract, sells the property either at public or private sale, the surplus beyond the purchase money due belongs to the vendee, and payment may be decreed by a judgment. *Ib.*

52. A vendor of real estate has a lien on the same in the hands of the administrator of the purchaser, for the unpaid purchase money. *Cahoon* v. *Robinson*, 6 Cal. 226.

53. The right of a vendor to a stoppage in transitu exists until the goods arrive at their final destination or come into the possession of the consignee. Depositing the goods at an intermediate point with an agent of the vendee, to be forwarded, does not terminate the transitus. *Markwald* v. *His Creditors*, 7 Cal. 214.

54. Where the plaintiff sold a number of bales of drillings to A. for the purpose of making sacks, deliverable to A. as fast as he needed them for manufacturing, and A. agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking the sacks as he should make his payments: held, that upon the delivery of the drills to A. the title thereto vested in him, and that plaintiff had no lien thereon or on the sacks until they were delivered to him. *Hewlett* v. *Flint*, 7 Cal. 264.

55. A vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase money. And the lien equally exists, whether the instrument amounts to a conveyance or merely to an executory contract. *Walker* v. *Sedgwick*, 8 Cal. 403.

56. A purchaser at sheriff's sale may have a lien upon the property prior to that of the redemptioner, the fact that he is a creditor does not divest the lien; he may be both a creditor and a purchaser and still have a prior lien to that of the redemptioner; this can only be so on the principle that the legal estate is still in the judgment debtor until the delivery of the sheriff's deed. *Knight* v. *Fair*, 9 Cal. 118.

57. In all cases where a mere lien exists, the legal estate may lie in some other party than the mortgagee; this legal estate and the consequent right to discharge the lien and save the estate is of value and can be sold. *Ib.*

58. A vendor's lien does not exist in this state where a mortgage security is taken for purchase money. The silent lien is extinguished, whenever he manifests an intention to abandon or not to look to it. *Hunt* v. *Waterman*, 12 Cal. 305.

59. The fact that such mortgage is defective does not revive the lien, as it is the intention of the vendor which controls, and this is as well shown by an informal mortgage as one properly done. *Ib.*

60. A general averment in the complaint to enforce the vendor's lien, that the mortgage is defective as a security, is not sufficient to withdraw the case from the general rules above stated. *Ib.*

61. Equity raises no lien in relation to real estate, except that of a vendor for the purchase money. *Ellison* v. *Jackson Water Co.*, 12 Cal. 554.

62. Land on which a vendor's lien exists for the purchase money, may become a homestead, but the homestead right is subordinate to the lien. *McHendry* v. *Reilly*, 13 Cal. 76.

63. The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee. *Sparks* v. *Hess*, 15 Cal. 192.

64. This equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The court, after determining the amount of the lien, can, by its decree, either direct a sale of the property for its satisfaction, and execution for any deficiency, or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case may require. *Ib.* 193.

65. Where the contract of sale of real property is unexecuted, the vendor retaining the legal title for security until all the purchase money is paid, the vendor's lien retained is different from the ordinary lien of a vendor after conveyance executed. In the latter case, the vendor has parted with the legal and equitable title, and possesses only a bare right, which is of no operative force or effect until established by the decree of the court. In the former case, the vendor's position is somewhat similar to that of a party executing a conveyance and taking a mortgage back. He may sue at law for the balance of his purchase money, or file his bill in equity for the specific performance of the contract, and take an alternative decree, that if the purchaser will not accept a conveyance and pay the purchase money, the premises will be sold to raise such money, and that the vendee pay such deficiency remaining after the application of the proceeds arising from such sale. *Ib.* 194.

66. In such case of an unexecuted conveyance, the vendor may ask either a decree directing performance, and in case of refusal, a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract. He may, however, insist upon a sale where performance is refused, and is not bound to make a mere foreclosure of the vendor's right to a deed. *Ib.*

67. In suit to recover money due on a promissory note, and to establish a lien for the amount upon certain real estate purchased with money advanced by plaintiff to defendant, and for which advance the note was given, the clerk entered judgment by default for the amount of the note. Plaintiff, having exhausted his remedies on this judgment, by execution and proceedings supplementary thereto, obtained from the court a decree for the equitable relief sought in the complaint, to wit: for a lien upon, and a sale of the real estate: held, that this decree was coram non judice, and void—assuming the judgment by the defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. *Kittridge* v. *Stevens*, 16 Cal. 382.

See MECHANIC'S LIEN.

LIMITATION, STATUTE OF.

1. It is better to place the statute within the discretion of the court, so as to allow it to be pleaded at any time upon terms, if it be proper, where the ends of justice will be attained by it. *Cooke* v. *Spears*, 2 Cal. 411.

2. If the defendant fail to plead the

statute at the proper time, he will not be permitted to amend his answer so as to introduce the plea, unless it would further the end of justice. *Ib.*

3. The act of May 4th, 1852, only alters a portion of the act of April 22d, 1850, section seventeen; it does not change the period of five years in which suit may be brought on judgments or decrees of courts of the United States, or any State or territory. *Cavender* v. *Guild*, 4 Cal. 253.

4. A foreign judgment is not a contract obligation or liability founded on an instrument of writing, executed out of this State, within the meaning of the statute. *Patten* v. *Ray*, 4 Cal. 287.

5. Such instruments as bear upon their face, "audited and approved," are not barred by that portion of the statute of limitations applying to accounts. *Sannickson* v. *Brown*, 5 Cal. 58.

6. In an action for contribution between joint obligors, the statute of limitations does not begin to run until after the payment of the debt by the plaintiff. *Sherwood* v. *Dunbar*, 6 Cal. 55.

7. Where the payment was made by plaintiff, by settlement of accounts with the payee of a note, the statute only begins to run from the date of the appropriation of the money due by the payee to the plaintiff, to the payment of the note. *Ib.*

8. After twenty years' acquiescence in the terms of a will, an heir should not be allowed to dispute his own acts, or to contest the will on abstract points of law, which had never any force in California. *Castro* v. *Castro*, 6 Cal. 161.

9. The act of 1855 is the only statute of limitations to actions for the recovery of real property, and that the time fixed therein runs only from the date of that act. *Billings* v. *Harvey*, 6 Cal. 383; *Billings* v. *Hall*, 7 Cal. 3.

10. Statutes of limitations do not act retrospectively; they do not begin to run until they are passed, and consequently cannot be pleaded until the period fixed by them has fully run since their passage. *Nelson* v. *Nelson*, 6 Cal. 433; *Lehmaier* v. *King*, 9 Cal. 374.

11. While time is not of the essence of the contract, ordinarily, yet in every case it will devolve on the party seeking relief to account for his delay, and if there are circumstances showing culpable negligence on his part, or if the length of time which has been permitted to intervene, together with other circumstances, raises the presumption of an abandonment of the contract; or if the property has greatly advanced in value in the meantime, and the purchaser has laid by apparently to take advantage of the circumstance, he will not be entitled to a decree in his favor. *Brown* v. *Covillaud*, 6 Cal. 571; *Pearis* v. *Covillaud*, 6 Cal. 621; *Green* v. *Covillaud*, 10 Cal. 324.

12. Statutes of limitation have been properly denominated statutes of repose, because the law, for the purpose of preventing litigation, has wisely determined that there should be a period affixed beyond which a party ought not to be allowed to assert a stale demand, and that the presumption of payment, or of title, ought to arise after he had neglected to assert his right for a certain length of time. *Billings* v. *Hall*, 7 Cal. 3.

13. The statutes of limitation are designed to affect the remedy, and not the right or contract; that they do not enter into the contract, as a part of the law thereof; and that it would be inconsistent with sound morality and wise legislation to suppose that it was ever intended that when a party gave his obligation to pay a particular debt, he was presumed to have had in his mind a particular period of time, beyond which if he protracted his obligation his liability would cease. *Ib.* 4.

14. A claim against an estate when allowed, has the effect of a judgment against the administrator, and it would not be barred unless time enough has run to bar a judgment. *Beckett* v. *Selover*, 7 Cal. 229.

15. The presentation of the claim to the administrator is the commencement of a suit upon it, and is sufficient under the statute to stop the running of the statute of limitation. *Ib.* 241.

16. The statute of limitations of this State only commences running against a judgment from the time of the final entry thereof. *Parke* v. *Williams*, 7 Cal. 249.

17. Where the plaintiff filed a bill in equity in 1852, to set aside a sale of land made in 1835, on the ground of fraud: held, that his right to recover would be barred by ten years' prescription under the Mexican law, and that the full period having run he could not recover. *Dominguez* v. *Dominguez*, 7 Cal. 427.

18. It is the duty of the consignee, not only to inform his principal of the sales, but to remit the proceeds, and where he fails so to do, the statute of limitations will not run against the claim. *Kane* v. *Cook*, 8 Cal. 458.

19. Statutes of limitations are intended to prevent the assertion of stale claims, which it may be difficult or impossible to defeat by furnishing the requisite proof, owing to the lapse of time; and also proceeding upon the presumption of payment. They are not intended to protect the party, who by a fraudulent concealment, has delayed the assertion of a right. *Ib.*

20. A fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good reply to the plea of the statute of limitation. *Ib.* 461.

21. An execution can only be issued upon a judgment obtained before a justice of the peace, within five years after the entry of the judgment. In contemplation of the statute, there is no judgment after that time. *White* v. *Clark*, 8 Cal. 513.

22. If a mere trespasser upon the prior actual possession of a party could justify his act by showing the true title outstanding in a third person no party to the suit, then a prior possessor might never gain repose by virtue of his adverse possession, and could never gain a title under the statute of limitations. *Bird* v. *Lisbros*, 9 Cal. 5.

23. The purchaser is bound to know the chain of title through which he claims; and if that chain only leads him back to the possession of his grantors, and the period of that possession is short of the time fixed by the statute of limitations, he must be held responsible for all the acts of those through whom he claims. *Ib.* 6.

24. A part payment made before a contract has expired by limitation, is insufficient to take the case out of the statute. *Fairbanks* v. *Dawson*, 9 Cal. 92.

25. The object of the statute was to substitute a written contract for that which might be implied from admissions, and to avoid the mischief arising from parol testimony, to prove either an express promise, or facts from which a promise would follow as a legal and logical result. *Ib.*

26. Where it appears upon the face of a bill in equity, that the suit is barred by limitation, the defendant may demur. *Sublette* v. *Tinney*, 9 Cal. 425; *Barringer* v. *Warden*, 12 Cal. 314.

27. The statute of limitations, therefore, can only be construed to apply to judgments not in esse at the time of the passage of the act of 1855, or as giving two years from the passage of the act within which to sue upon such as were not already barred by the act of 1850. *Scarborough* v. *Dugan*, 10 Cal. 308.

28. Where D. had a running account with L., from 1838 to 1849, at which time L. died intestate, and no administration was had on his estate until 1857, and D. within one year after the granting of letters of administration, commenced his suit on said account against the estate: held, that the suit was commenced in time. *Danglada* v. *De la Guerra*, 10 Cal. 386.

29. If a defendant has been out of the State, it must be so averred in an indictment. Prima facie the lapse of time is a good defense; and where the statutory exception is relied on, it must be set up. *People* v. *Miller*, 12 Cal. 295.

30. Where a complaint shows prima facie upon the facts stated, that the claim or debt upon which suit is brought is barred by the statute of limitation, the defendant may take advantage by demurrer. But when the complaint does not directly show prima facie a case for the operation of statute, a demurrer cannot be sustained on this ground. *Barringer* v. *Warden*, 12 Cal. 314.

31. Where a note only operated to extend the time of payment of a debt to the time a note fell due, the statute of limitations would commence running only from that time. *Griffith* v. *Grogan*, 12 Cal. 324.

32. The question of the statute of limitation cannot be raised on appeal, unless presented in some form on the trial below, even though it be pleaded. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 13 Cal. 238.

33. An equitable action to set aside a fraudulent deed of real estate, when the effect would be to restore the possession to the defrauded party, is an action for the recovery of real estate, and governed by the statute of limitations applicable to such actions. *City of Oakland* v. *Carpentier*, 13 Cal. 552.

34. Where a reward was for such information as would lead to the arrest and

conviction of a criminal, there could be no claim for the money until trial and conviction. The statute of limitations begins to run from that time, and the limitation would be four years, as on a written contract. *Ryer* v. *Stockwell*, 14 Cal. 137.

35. Two defendants filed a joint plea of the statute of limitations, and the plea being held bad as to one defendant, the court on the trial permitted the other defendant to file a separate plea of the statute: held, that this was no such gross abuse of discretion as to enable the supreme court to revise it. *Robinson* v. *Smith*, 14 Cal. 254.

36. The commissioners of the funded debt of the city of San Francisco have power, under the act of 1851, authorizing them to sell the realty conveyed to them by the commissioners of the sinking fund, created by ordinance of said city, to receive the three per cent. scrip of the city instead of cash on the sale, it being conceded that the assets of the city were sufficient to pay all debts. Whether the statute of limitations runs against a trust like this of the commissioners of said funded debt, and whether they may not pay claims barred, query? *People* v. *Commissioners of the Funded Debt of the City of San Francisco*, 14 Cal. 541.

37. The grand jury may inquire into all offenses committed within the county not barred by the statute of limitations. *People* v. *Beatty*, 14 Cal. 570.

38. The three hundred and forty-fifth section of the code authorizing the supreme court, on the reversal or modification of the judgment or order below, to make restitution of the property and rights lost by the erroneous judgment or order, does not exclude the lower court from exercising the same power, and the party aggrieved may proceed in the lower court by motion, against which there seems to be no statute of limitations, there being in this case no unreasonable delay. *Reynolds* v. *Harris*, 14 Cal. 678.

39. The eleventh section of the act of 1856, for the protection of actual settlers, and to quiet land titles, only applies to actions brought to recover the possession of lands after the issuance of a patent. *Morton* v. *Folger*, 15 Cal. 284.

40. The general language of section one of the limitation act of 1855, that actions in the cases therein named "can only be commenced within two years from the time the cause of action has accrued, or shall accrue," is controlled and limited by the twenty-second section of the limitation act of 1850. *Palmer* v. *Shaw*, 16 Cal. 96.

41. Suit commenced January 8th, 1859, on a note executed in New York, and due January 1st, 1856. Defendant not in this State when the cause of action accrued, but arrived here March 28th, 1856, and remained until June 20th, 1856, from which time he was absent until February 14th, 1857. Plaintiff resided in New York, and was fully informed of the movements of defendant. Some evidence tending to show that defendant came to this State in 1856, for a temporary business purpose, intending to return to New York and form a partnership, according to previous arrangement. Defense, statute of limitations of two years: held, that the case is within the statute, and that the statute commenced running on the arrival of the defendant here in March, 1856—there being no fraud or concealment on the part of defendant, and his presence here between March and June being open and public, and sufficient for the commencement of a suit. *Ib.*

42. The word "return," used in the twenty-second section of the limitation act of 1850, is held by the authorities to apply as well to persons coming from abroad as to the citizens of the country going abroad for a temporary purpose and returning. But the coming from abroad must not be clandestine, and with an intent to defraud the creditor, by setting the statute in operation and then departing. *Ib.*

43. Where plaintiff deposits money with defendant, to be loaned out from time to time, the interest to be collected, and principal and interest held by him for plaintiff until called for, there is a continuous trust, and the statute of limitations does not begin to run in favor of defendant until after demand made by plaintiff. *Baker* v. *Joseph*, 16 Cal. 176.

44. It is not error for a court to refuse permission to set up the statute of limitations after answering to the merits. *Stuart* v. *Lander*, 16 Cal. 375.

45. An executor or administrator, holding a debt against the estate of deceased, cannot pay himself and claim a credit

when he has never presented his claim for allowance to the probate judge. The statute requires claims against the estate to be presented in accordance with its directions, whether the claims be held by executors and administrators or by other creditors of the deceased; and if not so presented within ten months from publication of notice for presentation, they are barred. *Estate of Taylor*, 16 Cal. 434.

46. The sale of December 26th, 1853, under ordinance No. 481, being void, no title passed to the purchaser at that sale. The title to the property still exists in the city, except where deeds have since been taken under the acts of 1858 or 1860. The property remaining can at any time be taken possession or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert her title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money. *Mc Cracken* v. *City of San Francisco*, 16 Cal. 632.

47. The statute of limitations runs only in favor of parties in possession claiming title adversely to the whole world, and not in favor of those who assert the title to be in others. It therefore never run in favor of the plaintiff, and the grantees of the plaintiff are in no better position. Their possession cannot be tacked on to that of the grantors, so as to render adverse the possession for the entire period subsequent to the sale. *Ib.* 635.

48. To render possession adverse, so as to set the statute of limitations in motion, it must be accompanied with a claim of title, and this claim, when founded "upon a written instrument as being a conveyance of the premises," must be asserted by the occupant in good faith, in the belief that he has good right to the premises, and with the intention to hold them against all the world. The claim must be absolute—not dependent upon any contingencies—and must be "exclusive of any other right;" and to render the adverse possession thus commenced effectual as a bar to a recovery by the true owner, the possession must be continued without interruption, under such claim, for five years. When parties assert, either by declarations or conduct, the title to property to be in others, the statute cannot, of course, run in their favor. Their possession under such circumstances is not adverse. *Ib.* 636.

LIS PENDENS.

1. A bona fide purchaser of land without notice of proceedings pending for its condemnation at the time of purchase, no notice of lis pendens being filed, is not affected by the proceedings. *Bensley* v. *Mountain Lake Water Co.*, 13 Cal. 319.

2. The effect of a lis pendens is to make a subsequent purchaser from the party a mere volunteer, affected by the judgment rendered, or which might be rendered in the suit of the pendency of which notice was given. *Gregory* v. *Haynes*, 13 Cal. 594; *Curtis* v. *Sutter*, 15 Cal. 263.

3. To enforce a vendor's lien, a bill in equity will lie, and the filing of notice of lis pendens will impart to purchasers information of the claim, and protect the property against transfers pendente lite. *Sparks* v. *Hess*, 15 Cal. 193.

See LIEN.

LOTTERY.

1. When suits have been commenced before a magistrate against the drawers of prizes in a lottery, to forfeit the prizes drawn to the State, a bill for an injunction against the owners of the lottery to restrain them from disposing of the prizes until the decision of those suits will properly lie in the district court; the prizes are forfeited as soon as drawn and before they are delivered. *People* v. *Kent*, 6 Cal. 90.

LUNATIC.

See INSANITY.

MALICE.

1. It was error for the court to instruct the jury "that when a person injuriously slanders the title of another, malice is presumed." It was also error to instruct them that fraud could not be presumed, but may be established by circumstances, but not of a light character; the circumstances must be of a most conclusive nature. *McDaniel* v. *Baca*, 2 Cal. 339.

2. A homicide being admitted or proved, the law raises the presumption of malice, which it is necessary for the prisoner to rebut by proof. *People* v. *Milgate*, 5 Cal. 129; *People* v. *March*, 6 Cal. 547.

3. It is the duty and province of the jury to draw the inference of express malice from the facts and the circumstances of the case, and the court properly refused to instruct the jury that there was no evidence of express malice. *People* v. *Roberts*, 6 Cal. 217.

4. There can be no murder without malice, express or implied. *People* v. *Moore*, 8 Cal. 93.

5. Public policy and security require that prosecutors should be protected by the law for civil liabilities, except in those cases where the two elements of malice in the prosecutor and want of probable cause for the prosecution both occur. *Potter* v. *Seale*, 8 Cal. 220.

6. Though malice be proved, yet if there was probable cause, the action must fail. *Ib.*

7. The question of malice is one for the jury to decide. It may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff. *Ib.*

8. Malice cannot be presumed in a prosecution when the defendant has incurred all the moral guilt of the charge, although he may have evaded the penalty of the law. *Sears* v. *Hathaway*, 12 Cal. 279.

MALICIOUS PROSECUTION.

1. It is the proper exercise of power in a court, to grant a new trial on the ground of excessive damages for malicious prosecution, when the verdict is greatly inconsistent in its relation to the facts. *Potter* v. *Seale*, 5 Cal. 411.

2. S. paid P. for certain promissory notes, which P. failed to deliver, saying he would get them out of pledge and deliver them up, which he afterwards refused to do. S. had P. arrested, when he was discharged on a technical ground: held, that it was not a malicious prosecution, and that S. had probable cause. *Ib.*

3. Where the second of a set of bills of exchange was presented and protested, owing to the absence of the drawee, and the first of exchange arrived nine days after and was paid, together with costs of protest of the second, and two months after suit was commenced on the protested bill: held, that in an action for malicious prosecution of said suit, the question whether the plaintiffs in the suit on said bill knew that the bill was in fact paid at the time they commenced suit, was a question for the jury. *Weaver* v. *Page*, 6 Cal. 684.

4. In actions for a malicious prosecution, the jury are not confined to the actual pecuniary loss, but may take into consideration the character and position of the parties, and all the circumstances of the case. *Ib.* 685.

5. Public policy and security require that prosecutors should be protected by law for civil liabilities, except in those cases where the two elements of malice in the prosecutor and want of probable cause for the prosecution both occur. *Potter* v. *Seale*, 8 Cal. 220.

6. Though malice be proved, yet if there was probable cause, the action must fail. *Ib.*

7. Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff. *Ib.*

8. Where the defendant has fully and fairly laid his case before counsel and acts by advice thereof, it is a good defense to the action, though the question whether the defendant acted bona fide under such advice is a question of intention, to be determined by the jury *Ib.*

9. Plaintiff and one C., partners in the mercantile business, purchased of defend-

ant goods on credit, which were shortly afterward sold by plaintiff and his partner at a sacrifice and the proceeds immediately invested in a homestead in the name of C., who was the brother-in-law of plaintiff. Defendant subsequently caused plaintiffs to be arrested upon the charge of cheating, from which arrest they were discharged. Afterwards defendant caused plaintiff and C. to be arrested on a charge of concealing property with intent to defraud and delay their creditors; the charge was dismissed as to plaintiff, and C. was sent up to the criminal court to answer. Plaintiff thereupon brought his action against defendant for malicious prosecution: held, that if plaintiff was entitled to any damage, he could recover only the actual damage which he sustained by the arrest. *Sears* v. *Hathaway*, 12 Cal. 279.

MANDAMUS.

1. Authority is vested by the statute in the supreme court to issue writs of mandamus in all cases in which it may appear to form the appropriate remedy, and the constitution warrants that authority whenever the issuance of that writ may be necessary to render the appellate jurisdiction effectual. *People* v. *Turner*, 1 Cal. 145; *White* v *Lighthall*, 1 Cal. 348.

2. To enable a court of strictly appellate jurisdiction to issue the writ of mandamus, it must be shown to be an exercise or be necessary to the exercise of appellate jurisdiction. *People* v. *Turner*, 1 Cal. 146.

3. The very nature of a writ of mandamus implies the idea of a superior and an inferior tribunal. *Ib.* 148.

4. The district courts of the State have all the same jurisdiction and powers and stand on the same level, and one cannot attempt by a writ of mandamus to supervise, direct or restrain the action of another. *Ib.* 149.

5. The writ of mandamus will lie if the applicant have no other specific and adequate legal remedy, and if the effect of it would be not to interfere with the exercise of the discretionary powers of the court. *Ib.* 151.

6. An attachment for contempt for disobedience of a mandamus will not issue, unless it appear affirmatively that the mandamus was sought to be enforced by some party. *Ib.* 189.

7. Where a mandamus directed the the judge of a district court to reinstate certain parties expelled by him to the rolls of practicing attorneys, and they were summoned to appear and show cause for an offense alleged to have been committed subsequently: held, that the court would thereupon presume that the mandate had been obeyed. *Ib.*

8. This writ will lie when another remedy, if any lie, would be too uncertain, and subject the party to great delay, and will lie to an inferior court to restore an attorney removed by it. *Ib.* 190.

9. Judgment may be affirmed as to a mandamus, but reversed as to costs. *McDougal* v. *Roman*, 2 Cal. 80.

10. In an application for a mandamus the statute does not require a replication, except where, in the discretion of the court, it is necessary to explain or avoid facts set up in defendant's answer. *Fowler* v. *Pierce*, 2 Cal. 166.

11. A mandamus may issue to compel the controller of State to account to a legislature for the daily compensation fixed by law. *Ib.*

12. A mandamus lies to compel a judge of a district court to enter a judgment on the report of a referee. *Russell* v. *Elliott*, 2 Cal. 247.

13. A mandamus is not the proper remedy where an inferior court refuses to enter a judgment for costs. The party complaining should appeal or bring his action for costs. *Peralta* v. *Adams*, 2 Cal. 595.

14. A mandamus will not lie where there is any other specific, speedy and adequate remedy. *People* v. *Olds*, 3 Cal. 173.

15. Title to an office cannot be tried upon a mandamus, neither at common law nor under the statute. *Ib.* 175.

16. A mandamus can give no right, but may be sought, to put a party in a position to assert his right. *Ib.*

17. A mandamus will not lie where the office claimed is filled, or against an incumbent de facto, unless the party be without other remedy. *Ib.*

18. The distinction between writs of mandate and quo warranto, as held in England, is not abolished by the statute of this State, but is fully recognized. *Ib.* 177.

19. On a mandamus to compel a party to allow a claim in which they have discretionary powers, he cannot be permitted in the same breath to admit the right to compensation and then refuse to grant it. *Selkirk* v. *City of Sacramento*, 3 Cal. 326.

20. Mandamus may be sought to compel an officer to do an act which is sought to be enforced in all cases where the officer has no discretion and where he is under no obligation to do the specific act and there is no adequate remedy in the ordinary course of law. *McDougal* v. *Bell*, 4 Cal. 176.

21. A mandamus will not issue to compel any person, inferior officer, court or corporation to act in any particular manner where such person, officer, court or corporation is invested with discretionary power. *Ib.*

22. A mandamus against the controller is defective if it fails to allege that there is "money not otherwise appropriated by law" out of which the statute authorizes the appropriation in question to be paid. *Redding* v. *Bell*, 4 Cal. 333.

23. A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale who refuses to pay the purchase money, on the ground that he is entitled to it as the oldest judgment and execution creditor, especially when there is an unsettled contest as to the priority of his lien. *Williams* v. *Smith*, 6 Cal. 91.

24. A mandamus can only compel a board of supervisors to act, but cannot direct their action, and the rejection of an account is an action upon it, which is all a mandamus could require where the compensation claimed in the account is not fixed by law. *Pierce* v. *Sacramento County*, 6 Cal. 255.

25. A mandamus to a board of supervisors to issue a warrant for a specific sum is irregular; it should direct them to audit the account and issue warrants accordingly. *Tuolumne County* v. *Stanislaus County*, 6 Cal. 442.

26. Where the district court granted an injunction, from the order granting which the defendant appealed, and then disobeyed the injunction, whereupon plaintiff asked for an attachment for contempt, which was refused, on the ground that the appeal superseded the injunction: held, that a mandamus may issue to compel the district judge to issue the attachment, the plaintiff's remedy, by appeal, being inadequate. *Merced Mining Co.* v. *Fremont*, 7 Cal. 133.

27. A mandamus will issue from a superior to an inferior court, to compel the issuance of an attachment for contempt where the proceeding is, in substance, a private right, though in form, a case of contempt. *Merced Mining Co.* v. *Fremont*, 7 Cal. 133; *Ortman* v. *Dixon*, 9 Cal. 24.

28. The writ of mandamus can only be issued to compel the performance of an act or duty clearly enjoined by law, and in a case where the party has no other plain, speedy and adequate remedy. *Draper* v. *Noteware*, 7 Cal. 278.

29. Where supervisors, in the exercise of their discretion, determined after hearing the testimony, that a ferry had not been properly kept, and therefore granted it to another, there is no authority to interfere with their determination; but when they act under mistake of law, and award the license to another, supposing that he has succeeded to the rights of the owner of the franchise, the error may be corrected by mandamus or any other proper proceeding. *Thomas* v. *Armstrong*, 7 Cal. 287.

30. A mandamus will not issue to compel the court below to enter a decree upon the report of a referee; the remedy is by appeal. *Ludlum* v. *Fourth District Court*, 9 Cal. 12.

31. The remedy of a plaintiff, if there is error in the order modifying the injunction, is by appeal; but he cannot have a mandamus to compel the issuance of an attachment for contempt. *Fremont* v. *Merced Mining Co.*, 9 Cal. 19.

32. In an application for a mandamus to compel a district judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where a district judge in his answer avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill: held, that the relator is not entitled to a jury to try the issue, under section four hundred and seventy-two of the code. *People* v. *Tenth District Court*, 9 Cal. 21.

33. Proceedings for a mandamus to compel the execution of a sheriff's deed to a redemptioner, can be commenced in the county where the relator resides. *McMillan* v. *Richards*, 9 Cal. 420.

34. Where an alternative mandamus was issued to a justice of the peace to compel him to send up papers on appeal to the county court, to which he answered that his fees had not been paid or tendered, "prior to the service of the alternate writ:" held, his answer is no defense to the writ being made peremptory, as his fees may have been paid since the service of the writ. *People* v. *Harris*, 9 Cal. 573.

35. To supersede the remedy by mandamus, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject matter of his application. *Fremont* v. *Crippin*, 10 Cal. 215.

36. Where a writ of restitution has been awarded in such a case, and the sheriff refuses to execute the same on the ground that the mine is in possession of certain persons not parties to the suit, who claim to hold under the corporation, the court will award a peremptory mandamus against the sheriff to compel him to execute the writ. *Ib.*

37. Neither a remedy by criminal prosecution, nor by action on the case for neglect of duty, will supersede that by mandamus, since it cannot compel a specific act to be done, and is, therefore, not equally convenient, beneficial and effectual. *Ib.*

38. A mandamus will not lie against the clerk of the district court, to compel him to issue execution on a money judgment, rendered in the court of which he is clerk. *Goodwin* v. *Glazer*, 10 Cal. 333.

39. Where the board of supervisors of a county have canvassed the return of an election, and in the exercise of their discretion declared the result of an election adversely to a party claiming to have been elected, a mandamus will not lie upon the application of such party to compel the board to issue to him a certificate of election. *Magee* v. *Supervisors of Calaveras County*, 10 Cal. 376.

40. When a judgment is rendered against a county, it is the duty of the supervisors to apply such funds in the treasury of the county as are not otherwise appropriated, to its payment; and if there are no funds, and they possess the requisite power to levy a tax for such purpose, and if they fail or refuse to apply the funds or to execute the power, resort may be had to mandamus. *Emeric* v. *Gilman*, 10 Cal. 410.

41. A mandamus directing a board of supervisors to proceed and audit certain accounts of the relator, does not necessarily require the board to allow the accounts; such board has a discretion in respect to their action in this regard, though compelled to act on the subject matter of the claim; such writ does not control or prescribe the mode, or determine the result of their action. *People* v. *Supervisors of San Francisco County*, 11 Cal. 47.

42. A mandamus will not lie against a county treasurer, to compel him to pay interest due on county bonds. *People* v. *Fogg*, 11 Cal. 390.

43. The question of the eligibility of a district judge cannot be tried on mandamus for his salary. *Turner* v. *Melony*, 13 Cal. 623.

44. Mandamus does not lie to compel the supervisors of a county to order a special election to fill vacancies in the offices of assessor and sheriff. *People* v. *Supervisors of Santa Barbara County*, 4 Cal. 102.

45. The supreme court has the right to compel inferior tribunals to proceed to hear and determine causes of which they refuse to take cognizance, and this by virtue of its appellate powers, and its authority to issue process necessary to give them effect. *Purcell* v. *McKune*, 14 Cal. 231.

46. But where the judge below requires such statement in a chancery case, and the attorney does not object, but fails to furnish it, and in consequence the court, on motion of plaintiffs for judgment on the pleadings and verdict, refuses to proceed until such statement is furnished, mandamus will not lie. *Ib.* 232.

47. On mandamus by the assignee of a sheriff's certificate of sale, to compel the execution of a deed, the question whether such a certificate is not merged in a deed made to the assignee by the execution debtor after the sale, cannot be tried. The right to the deed is the only matter in controversy. *People* v. *Irwin*, 14 Cal. 436.

48. A mandamus may issue to compel a judge to settle a bill of exceptions first, and then to sign it. *People* v. *Lee*, 14 Cal. 512.

49. The supreme court will not issue a mandamus to the clerks of the district courts in the first instance. The action or refusal to act of the clerks in suits pending in the several courts of this State can only be reviewed in this court through the ruling in relation to such action or refusal of the courts of which they are ministerial officers. *Cowell* v. *Buckelew*, 14 Cal. 642.

50. County courts, under the statute, have jurisdiction in proceedings by mandamus, and the statute is constitutional. *People* v. *Day*, 15 Cal. 92.

51. In forcible entry and detainer tried in the county court, on appeal from a justice's court, plaintiff having obtained a verdict for one hundred and fifty dollars damages, moved that they be trebled. Motion denied, and judgment entered for one hundred and fifty dollars, with restitution of the premises. Plaintiff applies to the supreme court for mandamus to compel the court below to render judgment for treble damages: held, that the application must be denied, as plaintiff has an adequate remedy by appeal; pending which, plaintiff can enforce so much of the judgment as awards restitution. The judgment can be corrected in this court, if proper, by trebling the damages. *Early* v. *Mannix*, 15 Cal. 150.

52. S. dies out of the State, leaving property in Santa Clara county, and the probate court thereof takes jurisdiction of the estate, and grants letters of administration to K. The widow subsequently files a petition to revoke the letters, on the ground that the probate court of San Francisco ought to have issued them, whereupon the administrator asks the court to transfer the cause to that court, representing that the widow and a majority of the witnesses resided there, and that the interest of several persons interested in the estate would be advanced by the transfer, to which both parties agreed. The court made an order of transfer. The probate court of San Francisco, on the papers being filed therein, refused to take jurisdiction of the cause, and ordered the papers back: held, that on these facts, the probate court of Santa Clara could not divest itself of jurisdiction and vest it in the probate court of San Francisco, and that mandamus will not issue to compel the latter court to take jurisdiction. *Estate of Scott*, 15 Cal. 221.

53. The State prison contract between the State and Estill remaining obligatory, not qualified by any legislation, it was the duty of the controller, upon demand of relators—assignees of Estill—to have issued warrants upon the treasurer for the sums claimed under the contract; and the performance of this can be enforced by mandamus. *People* v. *Brooks*, 16 Cal. 38.

54. Mandamus will issue to the governor in certain cases. *Ib.* 63.

55. Distinction, from political considerations, between the governor and the inferior officers of the executive department, as to the issuance of this writ, stated. *Ib.*

56. Relator conveyed to Y. one-third of certain real estate, in consideration that Y. should attend to a suit pending in the name of relator, for the recovery of the property. Y. employed an attorney to conduct the suit, the attorney of plaintiff being discharged. Relator moved the court below to substitute another attorney in place of the one employed by Y. Court refused to grant the motion—the only reason urged for the substitution being that Y. had neglected to prosecute the suit; and it not being shown that the agreement between him and relator had been canceled by the parties. Relator applies to this court for mandamus: held, that the writ lies; that the agreement between relator and Y. does not exclude the former from the right to prosecute the suit, and employ such attorney as he chooses; that the exercise of this right will not affect any right Y. may have in the property or suit; that he may intervene, if a proper case be made, or prosecute his rights independently, or wait until a recovery, and then claim his rights under the contract with relator. *People* v. *Norton*, 16 Cal. 440.

MANSLAUGHTER.

1. To reduce the crime of murder charged in the indictment to manslaughter, a provocation must be established, apparently sufficient to render the passion irresistible. *People* v. *Freeland*, 6 Cal. 98.

2. The defendant was convicted of manslaughter, upon an indictment charg-

ing the crime of murder. The verdict was on his motion set aside, and a second trial had: held, that the defendant can plead the former conviction of manslaughter, as an acquital of the crime of murder, and that he may be again tried under the same indictment and convicted for manslaughter. *People* v. *Gilmore*, 4 Cal. 378; *People* v. *Backus*, 5 Cal. 278.

3. No words of reproach, how grievous soever, are sufficient provocation to reduce the offense of an intentional homicide with a deadly weapon, from murder to manslaughter. *People* v. *Butler*, 8 Cal. 441.

See CRIMES AND CRIMINAL LAW, MURDER.

MARRIAGE.

1. By the Mexican law, marriage lawfully contracted in the face of the catholic church and between the members thereof, cannot be dissolved by the civil tribunals. *Harman* v. *Harman*, 1 Cal. 215.

2. Marriage is regarded as a civil contract, and no form is necessary for its solemnization. If it takes place between parties able to contract, an open avowal of the intention, and the assumption of the relative duties which it imposes on each other, is sufficient to render it valid and binding. *Graham* v. *Bennett*, 2 Cal. 506.

3. A marriage which is legitimate in form, but by the existence of a legal disability at the time rendered void, is a marriage deemed null in law, but the statute protects the issue and makes them legitimate. *Ib.*

4. In marriages null in law, the issues are the inheritors of the father's name or his heirs apparent, and entitled to look to and demand from him his care, maintenance and protection; and he has the same right to their custody, control and obedience as if the issue of a valid marriage. *Ib.*

5. Living together as man and wife is not marriage, nor is an agreement so to live a contract of marriage. *Letters* v. *Cady*, 10 Cal. 537.

6. Where the plaintiff averred in her complaint, in a suit brought for distributive share of the estate of an alleged deceased husband, that the deceased made proposals of marriage to her, which she accepted, and consented to live with him as his true and lawful wife; and that in accordance with his wishes she thenceforth lived and cohabited with him as his wife, always conducting herself as a true, faithful and affectionate wife should do; held, that these were insufficient averments of the existence of a marriage, and that the facts averred were only prima facie evidence of marriage. *Ib.*

7. There is no presumption of law that a marriage took place at any particular point, nor that property, especially money "and other personal property," was acquired in any particular locality. *Dye* v. *Dye*, 11 Cal. 167.

8. In an action for the division of the common property of husband and wife after a decree of divorce, it is not material where the marriage was solemnized if the parties afterwards, and after the passage of the act, resided and acquired the property here. *Ib.*

9. Marriage is regarded as an acknowledgment by the husband that the child is his; but as in all cases of acknowledgement, to be effective, there must be knowledge at the time of the fact admitted. *Baker* v. *Baker*, 13 Cal. 99.

10. Marriage is considered by our law as a civil contract to which the consent of the parties is essential, and is subject to avoidance for material and substantive fraud in its procurement. *Ib.*

11. A marriage procured without a contract can never be deemed valid. There is no more reason for sanctioning a marriage procured by fraud than one procured by force and violence. The consent is as totally wanting in view of the law in the former, as in the latter case. *Ib.* 102.

12. A woman, to be marriageable, must at the time be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract. A woman who has been pregnant over four months by a stranger, is not at the time in a condition to bear children to her husband, and the representation to that effect is false aud fraudulent. *Ib.* 103.

13. Upon a trial on an indictment for an attempt to contract an incestuous marriage, something more must be shown than

mere intention to contract such marriage. Preparations for the attempt indicate the intention, but between this and the attempt itself there is a wide difference. *People* v. *Murray*, 14 Cal. 159.

14. Where a court dissolves the bonds of matrimony it has no power to impose any restraint upon a second marriage, in the absence of express statute confirming it. *Barber* v. *Barber*, 16 Cal. 378.

See ADULTERY, COMMON PROPERTY, CRUELTY, DESERTION, DIVORCE, GUARDIAN AND WARD, HEIRS, HOMESTEAD, HUSBAND AND WIFE, INFANCY, PARENT AND CHILD.

MARRIED WOMAN.

See HUSBAND AND WIFE, SOLE TRADER.

MARYSVILLE.

1. The amendments to the charter of the city of Marysville provide that the common council shall not take any stock "in any public improvement, or effect a loan for any purpose," without first obtaining the consent of the people, at an election held for that purpose: held, that this could not be extended to improvements other than municipal in their character, and that the legislature did not intend to invest the city with authority to embark in speculative enterprises of improvement. *Low* v. *City of Marysville*, 5 Cal. 216.

MASTER AND SERVANT.

1. Where no definite period of employment is agreed upon, the master can discharge the servant at any time and eject him by force from his house if the servant refuses to leave after notice given to that effect. *DeBriar* v. *Minturn*, 1 Cal. 450.

2. Where the master ejects the servant from his premises, on his refusal to leave, after his discharge and being notified, the former should use no more force than is actually necessary to accomplish the object, in which latter case nominal damages can only be recovered. *Ib.*

3. Where a person agrees to work for a certain period at a certain price, or to perform certain services for a fixed amount, he cannot break off at his own pleasure and maintain an action for the work so far as he has gone; performance is a condition precedent to payment. *Hutchinson* v. *Wetmore*, 2 Cal. 312.

4. Where a hired person continues in employment after the expiration of the contract, and without any new contract, the fair presumption is, that both parties understood that the same salary was to be paid, and it is therefore error in a suit by the servant to allow him to recover upon a quantum meruit. *Nicholson* v. *Patchin*, 5 Cal. 475.

5. A master is bound to use reasonable care and diligence to prevent accident or injury to his servant, in the course of his employment; and if he fails to do so, he will be held responsible for the damages. *Hallower* v. *Henley*, 6 Cal. 210.

6. Where it appears that a coach, at the time of the accident, was driven by the servant or agent of the owner, the rule in such cases is, that the principal is liable only for simple negligence, and that exemplary damages cannot be imposed upon him. *Wardrobe* v. *California Stage Co.*, 7 Cal. 120.

7. In an action where the defense set up is, the negligence of the servant of plaintiff, the servant is not a competent witness for his employer. *Finn* v. *Vallejo Street Wharf Co.*, 7 Cal. 256.

8. Where the plaintiff was the stepmother of the defendants by whom she was supported, and for whom she performed domestic services, for the value of which she sued the defendants: held, that as she stood in "loco parentis" to defendants, the law does not imply any contract to pay for such services. *Murdock* v. *Murdock*, 7 Cal. 513.

9. The rule respondeat superior, as its

terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation whenever it exists, whether between principal and agent or master and servant, and to the subjects on which that relation extends, and is coëxtensive with it, and ceases when the relation itself ceases to exist. *Boswell* v. *Laird*, 8 Cal. 489.

10. Where parties employed architects reputed to be skilled in their profession, to construct, at a designated point on a creek, a dam or embankment of certain specific dimensions, capable of resisting all floods and freshets of the stream for the period of two years, and to deliver it completed at a given time; and before the embankment was completed it was broken by a sudden freshet, and a large body of water confined by it rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs, with their stock of merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiffs sued to recover the damage sustained by them against the employers and contractors: held, that the latter alone were liable, and that the relation of master and servant or superior and subordinate did not exist between them, and therefore the doctrine respondeat superior does not apply to the case. *Ib.* 490.

11. A person who undertakes the erection of a building or other work for his own benefit, is not responsible for injuries to third persons occasioned by the negligence of a person, or his servants, who are actually engaged in executing the whole work under an independent contract. *Ib.*

12. Where the owner of a mining claim contracts verbally with J. for the working thereof, and agrees to pay him a certain sum out of the proceeds of the mine, and J. goes into possession thereof, and while he is working it the owner sells it to a third party, who takes without notice of J's contract: held, that his claim is not subject or liable to J's contract. *Jenkins* v. *Redding*, 8 Cal. 603.

13. Possession of personal property is prima facie evidence of ownership. The possession of the servant is the possession of the master. *Goodwin* v. *Garr*, 8 Cal. 617.

14. Where an employee receives a regular specific monthly salary for his services, the presumption of law is that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary. *Cany* v. *Halleck*, 9 Cal. 201.

15. In a suit to recover for services for half a year, under a contract to work a whole year, plaintiff having quit the employment of defendant, it requires slight evidence of assent or agreement to apportion the contract and allow plaintiff to recover. *Hogan* v. *Titlow*, 14 Cal. 256.

16. In a suit by a female against two parties in a ranch, for services as servant to the firm, under an implied contract as on a quantum meruit, proof that plaintiff is the wife of one defendant is good under the general issue, as showing that there was no implied contract to pay for the services. *Angulo* v. *Sunol*, 14 Cal. 402.

See WAGES.

MASTER OF A VESSEL.

1. The conduct and management of a ship are always entrusted to a master, whether he has or has not a partial property in it, and in either case he is the confidential servant or agent of the owners at large. *Loring* v. *Illsley*, 1 Cal. 31.

2. The master of a vessel, as such, has no interest in it which can be the subject of levy and sale, under execution. He is but a naked agent, and has no substantial interest in the property which can be levied upon and sold. *Ib.*

3. If a master of a vessel be a part owner, his interest in the vessel may be levied on and sold, but his agency as master will be in no wise affected. *Ib.*

4. The responsibility of taking a position or berth for a vessel in port, rests upon the master of the vessel or the harbor master, therefore the owner is not exempt from liability for injuries committed by taking an improper berth, although such berth may have been selected by the pilot who brought the vessel into port. *Griswold* v. *Sharpe*, 2 Cal. 24.

5. Where the master of the vessel was in possession, and the record did not dis-

close any other owner, the admissions of the master were admissible in evidence with the same effect as if the suit had been against the master himself. *Bailey* v. *Steamer New World*, 2 Cal. 373.

6. The captain of a vessel drew on the owner for six hundred dollars to defray the expenses of the first mate, who was ill. In an action against the owner by the captain for wages, the owner endeavored to set off the draft: held, that this could not be done without producing the draft or showing payment of it. *Waterman* v. *Vanderbilt*, 3 Cal. 382.

See ADMIRALTY.

MECHANICS' LIEN.*

1. To enable those persons entitled to the benefit of the statute of the mechanics' lien law to avail themselves of this extraordinary remedy, all the provisions of the law must be strictly complied with. *Walker* v. *Hauss Hijo*, 1 Cal. 185; *Bottomly* v. *Grace Church*, 2 Cal. 91.

2. A material man, to enforce his lien for the price of the material furnished, must file in the notice his intention to hold a lien in statute time, or his lien, will be lost. *Walker* v. *Hauss Hijo*, 1 Cal. 185.

3. If the verdict of a jury fails to find a lien, the court cannot render a judgment essentially different from the verdict, and a verdict, so far, will be reversed. *Ib.* 186.

4. Under Mexican law, a person who furnishes materials for the erection of a building, has no lien on the building to secure payment for the materials furnished. *Macondray* v. *Simmons*, 1 Cal. 394; *Stowell* v. *Simmons*, 1 Cal. 452.

5. The description of property in a mechanic's lien, as situated on Battery, between Pacific and Jackson streets, in San Francisco, is sufficiently certain. *Hotaling* v. *Cronise*, 2 Cal. 63.

6. A transfer of property cannot defeat a lien which had already accrued upon the property. *Ib.* 64.

7. The materials must not only have been used in the construction of the building, but they must have been by the express terms of the contract furnished for the particular building on which the lien is claimed, and these facts must be alleged and proven. *Bottomly* v. *Grace Church*, 2 Cal. 91; *Houghton* v. *Blake*, 5 Cal. 240.

8. One who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the lien law, but must rest upon the equity of his case. *Godeffroy* v. *Caldwell*, 2 Cal. 491.

9. The statute of April 12th, 1850, has placed liens for materials and liens for labor on the same footing, and the proceeds of sale must be distributed in conformity to the same. *Moxley* v. *Shepard*, 3 Cal. 64.

10. The statute of April 12th, 1850, limits the structures on which the lien can exist to buildings and wharves. No lien can therefore exist on a bridge. *Burt* v. *Washington*, 3 Cal. 246.

11. Where a lien attaches upon a leasehold interest, it so attaches subject to all the conditions of the lease, and he who holds it can enforce it, notwithstanding a subsequent failure of the lessee to pay rent and a surrender of the lease to the lessor. *Gaskill* v. *Trainer*, 3 Cal. 339; *Gaskill* v. *Moore*, 4 Cal. 235.

12. It is necessary to record a mortgage to give notice only to "subsequent purchasers or mortgagors without notice," no mention is made of liens; hence it follows that a mechanic's lien will not precede an unrecorded mortgage of prior date.* *Rose* v. *Munie*, 4 Cal. 173.

13. Unless the answer of the garnishee discloses liens having a privity of claim upon the funds in his hands, judgment must be entered for the amount he admits due. *Cahoon* v. *Levy*, 4 Cal. 244.

14. A county court has no jurisdiction to enforce a mechanic's lien where the amount in controversy exceeds two hundred dollars. *Brock* v. *Bruce*, 5 Cal. 279.

15. T. & Co. were in the possession of certain property under a verbal agreement of sale from G., and employed W. to erect a building upon it. Before the completion

* The mechanics' lien law has undergone many changes in legislation, repeated alterations being made to meet the difficulties presented by the decisions of the supreme court upon the statute as then in force. See repealed statutes 1850, p. 211; 1853, p. 202; 1855, p. 156. The law now in force is statutes of 1856, p. 293; amended in 1857, p 84; 1858, p. 225, and 1861, p. 495.

*The lien aw, as subsequently enacted, abrogates this decision and gives liens precedence over unrecorded instruments

of the building, G. signed a deed to the land, and at the same time T. & Co. executed a mortgage for the purchase money: held, that the conveyance and mortgage were but one act, and that no prior lien on the general property of T. & Co. could have priority over the plaintiff's mortgage. *Guy* v. *Carriere*, 5 Cal. 512.

16. The statute concerning mechanics' liens was designated for two classes of laborers and contractors: first, contractors or material men, who contract directly with the owner of the building himself; and second, laborers, subcontractors, etc., who have no privity of contract with the owner. *Cahoon* v. *Levy*, 6 Cal. 296.

17. Contractors have an actual lien from the commencement of the work until sixty days after its completion; the subcontractors or laborers have their remedy by giving notice to the owner, and their lien attaches by the service of such notice. *Ib.*

18. A garnishment served on the owner, in a suit against the head contractor after the commencement of the building, and before notice served, must prevail over the lien of a sub-contractor or laborer. *Ib.* 297.

19. The remedy given, the subcontractor is simply in its nature an attachment without suit, but by notice, and having to give notice, he must yield to the claim of the attaching creditor. *Ib.*

20. Mortgages and liens of record form no exception to the rule prescribed by section 136 of the "act to regulate the estates of deceased persons," and the claims secured by them must have been presented to the executor or administrator and rejected by him before an action can be maintained. *Ellissen* v. *Halleck*, 6 Cal. 393; *Falkner* v. *Folsom*, 6 Cal. 412; *Hentsch* v. *Porter*, 10 Cal. 558.

21. A mortgagee in possession has a legal title against the whole world, subject to the rights of the mortgagor; therefore, where he mortgaged the property and subsequently erected a building on it, for the cost of which a mechanic's lien was filed, the holder of the lien cannot object to the legality of the mortgage in the face of which he contracted. *Ferguson* v. *Miller*, 6 Cal. 404.

22. An endorser of a note given in payment of a contract for building is incompetent as a witness to establish a mechanic's lien in favor of the holder of the note upon the property of the maker, being directly interested to have the lien established. *Soule* v. *Dawes*, 6 Cal. 475.

23. The lien of a subcontractor filed and notice given to the owner of a building within thirty days after the completion of the work, under the act of 1855, attaches from the time the work was commenced, and takes precedence over a garnishment served on the owner against the head contractor after the work was commenced and before the filing and serving notice of lien. *Tuttle* v. *Montford*, 7 Cal. 360.

24. The lien of the mechanic, artisan and material man is favored in law, because those parties have in part created the very property on which the lien attaches. *Ib.*

25. A mechanic's lien is in the nature of a mortgage; is a charge upon the land, and can only be assigned in writing. *Ritter* v. *Stevenson*, 7 Cal. 389.

26. Where the owner of a lot contracted for the erection of a house thereon, and agreed to pay certain sums of money as the work progressed, and on its completion to convey a certain other lot, for which purpose R. releases a mortgage on the lot, and during the work the owner of the lot on which the building was being erected mortgaged it to R., and subsequently, on its completion, by agreement with the builders, gave his note for $10,000, instead of the lot he was to convey, and the builders filed a notice of lien and assigned note and lien to plaintiff: held, that as much of the claim as represented the value of the lot which was to have been conveyed must be postponed to the mortgage. *Soule* v. *Dawes*, 7 Cal. 576.

27. The lien of the contractor, if filed in time, takes effect, by relation, from the date of the commencement of the work, and all persons who deal with the property during the work are charged with notice of the claim of the contractor. But if a party is informed of the nature of the contract between the owner and builder, and takes a conveyance of the property subject to it, no subsequent change of the terms of the contract can create an incumbrance which will have priority of his conveyance. *Soule* v. *Dawes*, 7 Cal. 576; *Crowell* v. *Gilmore*, 13 Cal. 56.

28. The following notice of mechanic's lien does not contain such a description of

the premises as the statute contemplates: "A dwelling house lately erected by me for J. W. Conner, situated on Bryant street, between Second and Third streets, in the city of San Francisco on lot No. —." *Montrose* v. *Conner*, 8 Cal. 347.

29. The evident intention of the mechanic's lien act was to give mechanics and artisans a lien on all work done by them, upon any description of property, and to give the mechanic a lien upon whatever interest the person who caused the superstructure had. *McGreary* v. *Osborne*, 9 Cal. 122.

30. Where a civil engineer's lien for work done for the defendants in the construction of a canal or ditch was filed in the recorder's office of the county where the ditch is located on the sixth day of May, 1856, and suit was not commenced to enforce the lien until the twenty-sixth day of January, 1857: held, that the time fixed by statute for the enforcement of the lien had expired before the commencement of the suit. *Green* v. *Jackson Water Co.*, 10 Cal. 375.

31. A decree for the sale of premises in a suit to enforce a mechanic's lien has the same and no greater effect upon the rights of purchasers and incumbrances prior to the commencement of the suit that a similar decree would have upon the foreclosure of a mortgage. *Whitney* v. *Higgins*, 10 Cal. 551.

32. The liens which, by the act of April 19th, 1856, entitled "an act for securing liens to mechanics and others," are required to be exhibited and proved upon publication of notice in some newspaper of the county, or be deemed waived, are liens arising under that act, and do not apply to other liens. *Ib.*

33. All persons interested in the premises prior to the suit brought to foreclose a mortgage, or to enforce a mechanic's lien, whether purchasers, heirs, devisees, remainder men, reversioners or incumbrancers, must be made parties, otherwise their rights will not be affected. Persons who acquire interest by conveyance or incumbrance after suit brought, need not be made parties. *Ib.* 552.

34. Where a mechanic's lien attached on certain premises January 18th, 1856, and a mortgage was placed on the same premises February 21st, 1856, and a suit was brought subsequent to the execution and record of the mortgage, to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such suit a sale was made, and after the expiration of six months, no redemption being had, a deed was executed to the assignee of the sheriff's certificate: held, that the right of the mortgagees to redeem the premises by paying off the incumbrances of the mechanic's lien was not affected by the decree and the proceedings thereunder, and that the purchaser of the premises upon a decree of foreclosure of the mortgage, having received his deed upon such purchase, was entitled to the same right to redeem. *Ib.* 553.

35. In a mechanic's lien, it is not necessary to give the items of the work and materials in the statement of the lien filed, where the contract for the construction of the building is in a sum in gross. *Heston* v. *Martin*, 11 Cal. 42.

36. Neither the mechanic's lien law of 1855 or 1856 give a lien upon canals or ditches. The language of the statute is "building, wharf, or other superstructure." A ditch is not a building or a wharf, and in no sense can it be designated a superstructure. *Ellison* v. *Jackson Water Co.*, 12 Cal. 554.

37. Under the mechanic's lien act of 1856, the owner of a building may contract to pay for it as soon as completed, and he is not liable to material men until notice served on him, and then only to the extent of the sum due the contractor at the date of the notice. *Knowles* v. *Joost*, 13 Cal. 621.

38. Under the mechanic's lien act, it is not necessary that the account to be filed in the recorder's office should remain in the office after it is recorded. *Mars* v. *McKay*, 14 Cal. 128.

39. A suit to enforce a particular lien, under the act, is a proceeding to enforce all the liens against the property, and an intervention in a suit already pending, if filed within the six months, is as much a compliance with the act as an original suit. *Ib.* 129.

40. In a suit to enforce a mechanic's lien on a ditch, a mortgagor of the ditch subsequent to the lien has no absolute right of intervention, and where the suit has been pending some time, and the application to intervene was made just as

plaintiff was taking judgment, the application was properly refused. *Hocker* v. *Kelley*, 14 Cal. 165.

41. For extra work on a building by the contractor, in pursuance of the general provision in the contract for extra work, at the will of the owner, there may be a lien on the property, as against a mortgagee, given by the owner before the extra work was commenced; provided, the work was done with the knowledge of the mortgagee, and without objection from him. *Soule* v. *Dawes*, 14 Cal. 250.

42. R. & Co., defendants, had two mechanic's liens upon certain property, one filed October 30th, 1854, the other filed December 8th, 1854, against defendant, V. In 1855, R. & Co. signed an entry on the record of liens, stating that the liens did not fall due until January 15th, 1856. This was done on the supposition that the act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16th, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and received a sheriff's deed. Plaintiff, as mortgagee of the property subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale on the ground of fraud: held, that R. & Co. and V. had a right to rescind the arrangement made to extend the lien, such extension having been made under misapprehension, the debt being legal and just, and plaintiff having acquired no rights which it would be inequitable to disturb; that such rescission is no evidence of fraud. *Gamble* v. *Voll*, 15 Cal. 509.

43. The fact that judgment on the liens in this case included a charge of interest at two per cent. given on a prior extension of the lien, which interest is over and above the original contract price for the articles for which the lien was claimed, is not of itself conclusive proof of fraud in the judgment, but such interest cannot be charged on the premises as against plaintiff. *Ib.* 510.

44. As subsequent mortgagee, plaintiff would have a right, in a proper case, to redeem the premises from the sale under the judgment of the liens, by paying the money justly due, interest, costs, etc.—he not having been party to the suit by the lienholder. *Ib.*

45. Plaintiffs here cannot object that the premises are not so described in the liens as to pass title under such sale. If from insufficient description R. & Co. got no title, plaintiffs have their remedy in ejectment. *Ib.*

46. In this case, the only ground for the interposition of equity being fraud, and this being ignored by the findings, the bill is dismissed; but the decree will be confined to the disposition of the fraud alone, leaving plaintiff at liberty to pursue his remedy in ejectment, if he have any, without prejudice from the decree. *Ib.*

47. Under the mechanic's lien act of 1858, material men, subcontractors, etc., have a lien upon the property described in the act to the extent—if so much be necessary—of the contract price of the principal contractor; but they must give notice of their claims to the owner, or the mere existence of such claims will not prevent the owner from paying the contractor, and thereby discharging himself from the debt. By giving such notice, the owner becomes liable to pay the subcontractors, material men, etc., as on garnishment or assignment; but if the owner pay according to his contract, in ignorance of such claims, the payment is good. *McAlpin* v. *Duncan*, 16 Cal. 127.

48. The notice of mechanic's lien, filed in the recorder's office, need not set out the items of the account; a general statement of the demand, showing its nature and character, and the amount due or owing thereon, is sufficient. *Brennan* v. *Swasey*, 16 Cal. 142.

49. A party having secured a mechanic's lien under the statute, does not forfeit or waive it by causing an attachment to be issued and levied upon property of the debtor to secure the same demand. The two remedies are cumulative, and both may be pursued at the same time. *Ib.*

50. If the party attempts to pursue them in separate actions, he might be put to his election; but it is no defense to an action to enforce the mechanic's lien, that in a previous suit for the same debt an attachment was issued and levied upon the property of the debtor, particularly when such suit has been dismissed, and nothing was realized by the attachment. *Ib.*

MERGER.

1. The surrender of a leasehold estate operates as a merger in the fee, but this cannot be suffered to defeat the right of a third party, whose rights intervened before the merger took effect. *Gaskill* v. *Trainer*, 3 Cal. 340.

2. The reconveyance of the leasehold estate, by mesne conveyances of such a description as amount to assignments of the lease, passes the entire estate of the lessee, which thereby becomes merged in the fee and extinguished. *Smiley* v. *Van Winkle*, 6 Cal. 606.

3. A judgment against one or more joint guarantors of a note bars the action against the others; when the contract is joint and not joint and several, the entire cause of action is merged in the judgment. *Brady* v. *Reynolds*, 13 Cal. 33.

4. The common law method, in such cases, of an inquisition of damages by a sheriff's jury on the writ of restitution, would be impracticable in estimating the rents and profits of a water ditch— involving, as the inquiry would, the receipts from sales of water every day for a long period, as also payments, expenses, etc. This is in its nature an equity proceeding— at least, to be disposed of according to equity practice. *Raun* v. *Reynolds*, 15 Cal. 471.

5. The party so in possession, under sheriff's sale, is in no better position than if he entered directly under the mortgage, to enforce which the sale was made; and having received the proceeds of the property by way of sales of water, and appropriated the same to his own use, he cannot hold the property bound by the mortgage, and at the same time refuse to give the mortgagor the benefits of the amount so received. In equity he is not a purchaser, but a mortgagor; and although the sale was not set aside until after the receipt of the rents and profits, still when it was set aside, the order took effect upon the relations of the parties as they existed before the sale, the mortgagors and the mortgagee have the same right they had before. *Ib.*

6. The foreclosure in this case did not merge the mortgage— at least, for all the purposes of this question as to accounting for the rents and profits. H. or his assignee was as much mortgagee after the decree as before. The reversal of the decree would not affect the mortgage, and if H. had entered into possession after the decree, but before any sale, he would have been bound to account for what he had received as mortgagee. Possibly the lien of the mortgage might have been destroyed by the judgment, but the mortgage was not destroyed, nor the relations of the parties as mortgagor and mortgagee. *Ib.*

7. In suit to recover money due on a promissory note, and to establish a lien for the amount upon certain real estate purchased with money advanced by plaintiff to defendant, and for which advance the note was given, the clerk entered judgment by default for the amount of the note. Plaintiff, having exhausted his remedies on this judgment, by execution and proceedings supplementary thereto, obtained from the court a decree for the equitable relief sought in the complaint, to wit: for a lien upon, and sale of the real estate: held, that this decree was coram non judice, and void— assuming the judgment by the defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. *Kittridge* v. *Stevens*, 16 Cal. 382.

METES AND BOUNDS.

1. Where the boundaries of a lot of land granted by an alcalde were uncertain, the jury should determine the true location of the lot in question. *Reynolds* v. *West*, 1 Cal. 328.

2. A description of premises in a lease, though imperfect, is sufficiently certain, if the boundaries of the premises can be ascertained with a reasonable degree of certainty, and they have taken possession of and occupied under the lease. *Pierce* v. *Minturn*, 1 Cal. 472.

3. The description in a mechanic's lien as situated on Battery, between Pacific and Jackson streets, in San Francisco, is sufficiently certain. *Hotaling* v. *Cronise*, 2 Cal. 63.

4. Hearsay evidence, even with regard to boundaries of parishes or towns, is only received where such boundary is of remote

antiquity, and query if ever it should be received to affect a private right. *Vanderslice* v. *Hanks*, 3 Cal. 45.

5. The boundaries of the water lot property of San Francisco are particularly set forth in the act of March 26th, 1851, and the question of what was the water line of the city at the date of the act, is one of fact. *Cook* v. *Bonnet*, 4 Cal. 398.

6. To describe land by a certain name is as good a description as by metes and bounds, if it can be rendered sufficiently certain by the evidence. *Castro* v. *Gill*, 5 Cal. 42.

7. Where a tract of land sold for a gross sum is described by specific boundaries, and as containing so many acres, more or less, the vendor cannot recover for the overplus, if on a survey it be ascertained that more land is contained in the tract than the precise amount named in the deed. *Chipman* v. *Briggs*, 5 Cal. 77.

8. Where the defendant claimed title to the premises as part of a preëmption claim located by him, he must prove an enclosure of, or marked and visible boundaries, embracing the lot in dispute. *Larue* v. *Gaskins*, 5 Cal. 166.

9. Where the line of a creek was the boundary between a city and the remainder of a county, both the city and county have the right to build a bridge over the creek. *Gilman* v. *Contra Costa County*, 5 Cal. 428.

10. In an action of foreclosure, where the complaint has a copy of the mortgage annexed, to which it refers: held, that a correct description of the land in the mortgage is sufficient for the purpose of the suit. *Emeric* v. *Tams*, 6 Cal. 156.

11. The statute requires that an assessment shall contain a list of the real estate, "giving the quantity of acres in each tract, as near as may be possible, except in case of city and town lots, which may be described by reference to numbers and streets." To require a particular description of mineral lands, would be imposing an unnecessary burden on the officer. *Palmer* v. *Boling*, 8 Cal. 388.

12. A patent for swamp and overflowed lands is a matter of evidence and description by metes and bounds, and its office is to make the description of the land definite and conclusive as between the United States and the State. *Owens* v. *Jackson*, 9 Cal. 324.

13. Where two several mining companies agree upon a boundary line between the claims of two companies, and subsequently other parties purchase the several interest of the two companies with a knowledge of the boundary line so fixed, both parties are concluded by it and are estopped from denying the line. *Mc Gee* v. *Stone*, 9 Cal. 606.

14. The lines of a quarter section of government land, which are distinctly marked by natural boundaries and by stakes placed at convenient distances so that the lines can be readily traced, are sufficient to authorize the occupant to maintain an action for trespass thereon, under the provisions of the act of April 11, 1850. *Taylor* v. *Woodward*, 10 Cal. 91.

15. Where there is a conflict between the boundaries of a grant of land as designated in the grant by parallels of latitude, and as designated by a map referred to in the grant, parol evidence is admissible in explanation of the boundaries, and to fix the location of the land granted. *Ferris* v. *Coover*, 10 Cal. 624.

16. If, taking the grant and map together, any portion of the description must be rejected, reference will be had to the circumstances under which the grant was made and the intentions of the parties, and parol evidence is inadmissible in such case for that purpose. That portion will be rejected, and that construction adopted which will give effect to the intentions of the parties. *Ib.* 628.

17. The rules adopted in the construction of boundaries are those which will best enable the court to ascertain the intention of the parties. Preference is given to monuments, because they are least liable to mistake; and the degree of importance given to natural or artificial monuments, courses and distances is just in proportion to the liability of parties to err in reference to them. But they do not occupy an inflexible position in regard to each other. It may sometimes happen in case of a clear mistake that an inferior means of location will control a higher. *Ib.*

18. When the quantity is mentioned in addition to a description of the boundaries or other certain designations of the land, without an express covenant that it contains that quantity, the whole is considered as a mere description. The quantity being the least certain part of the description,

must yield to the boundaries or number if they do not agree. *Stanley* v. *Green*, 12 Cal. 164.

19. The courts can ascertain and fix the position of boundaries which are designated, but cannot give boundaries to a specific quantity which has none, and lies in a larger tract. To give precision and location to such specific quantity, a survey must be made by the proper department of government, in which the subject is vested by the legislation of Congress. *Waterman* v. *Smith*, 13 Cal. 408; *Moore* v. *Wilkinson*, 13 Cal. 486.

20. Lands outside of a city or incorporated town must be described in an assessment by metes and bounds — the number of acres, as nearly as possible, and the locality and township must be given. *Lachman* v. *Clark*, 14 Cal. 133.

21. The Pulgas grant, in San Mateo county, is a grant by boundaries and not by quantity, being "tract known under the name of Las Pulgas, the boundaries of which are, on the south the creek of San Francisquito, on the north that of San Mateo, on the east the estuaries, and on the west the cañada de Raimundo" and "the tract of which mention is made is of four leagues of latitude and one of longitude." *Mc Garvey* v. *Little*, 15 Cal. 31.

22. The deposition of a surveyor who ran the boundary lines of a grant, taken in one action, is admissible in another action between different parties, as hearsay evidence upon the location of such lines, after his death. *Morton* v. *Folger*, 15 Cal. 278.

23. The declarations — on a question of boundary — of a deceased person, who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, are admissible, whether the boundary be one of a general or public interest, or be one between the estates of private proprietors, and their admissibility cannot be affected by the fact that they are reduced to writing and were made under oath in a judicial proceeding. *Ib.* 280.

24. In England, such evidence is confined to showing boundaries of parishes, manors, and the like, which are of public interest, and is not allowed to establish the boundary of a private estate, unless the matter be identical with that of a public or *quasi* public nature. *Ib.* 281.

25. Hence the deposition of Vioget, as to the position of the southern boundary of the Sutter grant, offered in connection with the map drawn by him, is admissible as hearsay evidence, though taken in another action between different parties. *Ib.* 282.

26. Such evidence is admissible as hearsay evidence from the necessity of the case, which, in this instance, presents itself with peculiar force. The survey by Vioget was made in 1841, when the valley of the Sacramento was occupied almost exclusively by roving tribes of Indians, and no interest was felt in preserving, on the surface of the ground, the evidence of its lines. At that time there were no white men, nor were there for years afterwards, to question Sutter's claim, or to dispute as to its boundaries. Whatever landmarks were originally made must have soon disappeared. Two cities, Sacramento and Marysville, one of them the second in population in the State, are built upon the land supposed to be within the grant to Sutter; and residents of these cities, and occupiers of land lying between them — numbered by thousands — have taken conveyances from Sutter, and expended their money in improvements, relying upon the survey and map of Vioget as evidence that their property is within the grant. *Ib.*

27. Besides, the land is divided into a large number of farms; and the doctrine is, that where the tract originally surveyed was large, and was subsequently divided into numerous farms, the boundary of the original tract serving as a boundary of the several farms, such evidence is admitted on principles similar to those which relate to the boundaries of a manor or parish. *Ib.*

28. In ejectment for land within Sutter's fort, in the city of Sacramento, if the petition of Sutter, soliciting eleven leagues in the establishment "named New Helvetia," and the grant in which is conceded the land referred to in the petition "named New Helvetia," be in evidence, together with the declarations of Vioget in connection with the accompanying map, fixing the southern boundary of the grant some miles below the American river, and also, together with the proof that the territory lying between the American river and Sutterville, the western line of Leidesdorff's grant and the Sacramente river, embracing "Sutter's Fort," and the inclosures and settlements around it, was

known and recognized by every one throughout the country as New Helvetia; that Sutter had entire and undisputed possession of the same; that no one questioned his right till 1850; and that the premises in dispute were within his inclosures at the fort; the evidence would be prima facie evidence, if not conclusive proof, that the premises were covered by the grant. *Ib.* 283.

29. Where a Mexican grant refers in its description of the premises to the plat or map accompanying the expediente, the plat or map becomes, for the purpose of identifying the land, as much a part of the grant itself as if incorporated therein. *Seaward* v. *Malotte*, 15 Cal. 306.

30. In an action of forcible entry and detainer, the complaint described the premises as "about ten rods square, situated within and comprising the north-westerly corner of that certain piece or parcel of land, bounded and described as follows, to wit:" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres). "The said ten rods square being situated from twenty to fifty feet, more or less, south-easterly from the house of defendant, and near the gate aforesaid, and near the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter's Point. Said gate was where this last road passed through. The proof, among other things, showed this ten rods to be called the north-easterly instead of the north-westerly corner of the tract. The judgment for plaintiff followed the description in the complaint. Defendant appeals: held, that the variance in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the north-easterly instead of the north-westerly corner, was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul* v. *Silver*, 16 Cal. 75.

31. Where the land granted by an Alcalde is shown to be within the limits of the four square leagues thus measured, the presumption attaches that it was public land, grantable as such, and that the Alcalde grant passed the title to the grantee. This presumption might be repelled by proof of an express assignment of the lands of the pueblo, which did not include the land granted by the Alcalde, or by proof that this was land reserved as a fort site, etc, or proof of an anterior or better title to the land by grant from some officer or body authorized to make it. *Payne* v. *Treadwell*, 16 Cal. 227.

32. A plaintiff suing for a lot in San Francisco may rest his case, prima facie, upon an alcalde grant in the usual form, and no further proof of title will be required than proof that the land granted is situated within the four square leagues, measured from the center of the presidio square in the manner directed by the ordinance. *Ib.*

33. San Francisco having been constituted, by a public, political act of the former government, a pueblo, Courts will take judicial notice of its existence, powers and rights, and among these last its general boundary and jurisdiction. *Ib.*

34. To hold the question of boundary lines shall be left to be determined in every case according to parol proof, would be to open the door to endless and fruitless litigation, and give rise to such uncertainties as would deny practically the benefit of any rule to those interested. It would be of little use to any man to have an alcalde grant, if there were no means left of locating the premises, or if this question were to be perpetually subject to opposing parol contestation. *Ib* 228.

35. *Morton* v. *Folger*, 15 Cal. 275, holding the declarations, on a question of boundary, of a deceased person who was in a situation to be acquainted with the matter, and who was, at the time, free from any interest therein, to be admissible, whether the boundary were one of general or public interest, or were one between the estates of private proprietors, affirmed. *Cornwall* v. *Culver*, 16 Cal. 428.

36. Circumstances under which the depositions of Vioget, now deceased, as to the boundary lines of the Sutter grant are admissible, stated. *Ib.* 429.

37. A complaint in ejectment, describing the premises as "lot No. 1, in block No. 23, as per plot of the town of Red Bluff, as laid out by the Red Bluff land corporation in 1853, being on the corner of Main and Sycamore streets, twenty-five feet on Main by one hundred and fifteen feet on Sycamore, and running back to the

alley," and specifying the county in which they are situated, by the terms "county of Tehama," in the title of the suit, sufficiently describes the premises. The description by metes and bounds is required only so far as they may be necessary to identify with certainty the property. *Doll* v. *Feller*, 16 Cal. 433.

38. Where land is described in a lease as "land lying along the American fork, bounded by said fork, and running down to land owned by Mark Stewart; thence easterly and north-easterly along a slough to the north of A street, and following the bank of said slough around where the high land slopes to said American fork," etc., the true construction of this description fixes the boundary on the slough, and the words "around where the high land slopes," if they have any meaning at all, can only be applied to the bank or high ground adjoining the slough. *De Rutte* v. *Muldrow*, 16 Cal. 514.

39. In ejectment on a patent, defendant introduced a witness who stated that he knew where the defendant resided; that he knew where Dry creek was, and where it entered Bear river; that he knew no other Dry creek than the one named, and did not think there was any other creek by that name between the foot-hills and Bear river. He was then requested to state, if he knew, whether the lands occupied by the defendant for the last two years or more, or any part thereof, lay below Dry creek and Bear river, the counsel declaring the object of the inquiry to be to show that the lands were not within the calls of the patent or grant. To this inquiry objection was made and sustained, on the ground that it did not relate to the starting point or monument named in the patent; the court offering at the time to allow the witness to be asked whether the lands were situated below the oak tree marked at the commencement or first monument of the patent: held, that the court below did not err in ruling out the testimony, because the question put to the witness did not, as it should have done,—limit the inquiry to that Dry creek at the junction of which the marked oak tree stood —it appearing from a map, incorporated into the patent, that there were two streams emptying into Bear river, within the calls of the patent, each of which was termed Dry creek, and that below one of them, and above the other, the premises in controversy were situated; and it further appearing that the description in the patent commenced at an oak tree marked with an (x) and certain figures and letters, at the junction of Dry creek and Bear river, and the map designated the position of the tree —the starting point—at the mouth of the lower Dry creek. *Mott* v. *Smith*, 16 Cal. 558.

40. From the description in the patent, and from the map, the position of this starting point was fixed beyond doubt; and, as the witness stated he knew only of one Dry creek, the inquiry made of him and ruled out would only tend to mislead and confuse the jury, unless that inquiry were limited to the Dry creek at the junction of which the marked tree stood; and the ruling of the court did not tend to exclude legitimate proof that the premises lay below the creek which the patent designated, but to require it to be directed to such creek, and not to the other creek of the same name. *Ib.*

41. The fact that a complaint in ejectment, in addition to giving a description of the premises by metes and bounds, designates them as one-half of a certain preëmption claim taken up by Morris, from whom plaintiff traced title, in 1850, and surveyed by the county surveyor, and recorded in conformity with the statute, does not make it essential, to entitle the plaintiffs to a recovery as against the defendant in possession, that they should allege in their complaint and establish on the trial such facts as would bring them within the provisions of the preëmption laws of the United States, or of the possessory act of this State. The designation of the property as a part of a preëmption claim does not preclude the claimants from relying upon any other source of title than the United States or the State. *Coryell* v. *Cain*, 16 Cal. 572.

See DESCRIPTION.

MEXICAN TITLE.

See ALCALDE GRANT, LAND.

MILL.

1. Where the plaintiffs and defendants entered into a partnership, by the terms of which the plaintiffs were to advance a sum of money and material for a saw mill, which they did, and the defendants removed the materials furnished by plaintiffs, and appropriated the same, including the money, to their own use: held, that the plaintiffs had a right to sue therefor at law, and for damages caused by defendants' violation of the partnership contract. *Crosby* v. *McDermitt*, 7 Cal. 148.

2. The engine and boilers, etc., used in a flour mill, being permanently fastened to the mill, which had its foundation in the ground: held, to be fixtures covered by a mortgage upon the premises, though put up after the execution of the mortgage, and held to pass to the purchaser of the mortgaged premises under a decree of foreclosure. *Sands* v. *Pfeiffer*, 10 Cal. 265.

3. A prior appropriator of the water of a stream for mill purposes is entitled to it to the extent appropriated, and for those purposes, to the exclusion of any subsequent appropriation of it for the same or any other purpose. *Ortman* v. *Dixon*, 13 Cal. 38.

4. No distinction can be drawn between a mill owner and a miner as to their rights in appropriating water. *Ortman* v. *Dixon*, 13 Cal. 39; *McDonald* v. *Bear River and Auburn W. & M. Co.*, 13 Cal. 236.

5. Where a party takes up a mill seat on public agricultural land, erects a saw mill, dwelling, etc., and appropriates the water of the stream for the use of the mill, he may use the water for a grist mill erected at the same place years afterwards. *Ib.* 237.

6. A steam engine and boiler fastened to a frame of timber, bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. *Merritt* v. *Judd*, 14 Cal. 69.

7. Such machinery, when applied to quartz leads, is a trade fixture, removable by the tenant, if otherwise removable; but this removal can only be during the tenancy and during such further period of possession by the tenant as he holds the premises under a right still to consider himself a tenant, and not during the time he may actually hold possession after his lease has expired. *Ib.*

8. A renewal of a lease terminates the tenant's right to remove fixtures; so with any other agreement which terminates possession under a lease. *Ib.* 72.

9. Although a lessor of land cannot in a given case claim the fixtures, it is otherwise of a mortgagee of the lease. Here the question is between the grantor and grantee, and the latter holds all fixtures, whether for trade or manufacture, agriculture or habitation. *Ib.* 73.

10. A general deed of mortgage or of bargain and sale passes the fixtures as part of the freehold. *Ib.*

11. At common law, a bond for a title is in effect a mortgage. The legal title remains in the vendor, and an equity vests in the vendee to have the title on compliance with the conditions. The legal title, as also the equity, goes to the whole estate and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclose. *Ib.*

See FIXTURES.

MINES AND MINING.

I. IN GENERAL.

1. Although the jurisdiction of mining claims is given to justices's courts, yet if the amount in controversy is above two hundred dollars, the district court has jurisdiction. No statute can deprive the latter court of the jurisdiction confirmed and defined by the constitution. *Hicks* v. *Bell*, 3 Cal. 224.

2. In a suit brought by one of the partners in a mining company against the com-

pany to recover his share, which had been sold for an alleged nonpayment of an assessment, and also to recover the sum of his proportionate share of the gold taken out by the said company, the district court had jurisdiction. *Schupler* v. *Evans*, 4 Cal. 212.

3. In a controversy between two mining companies it was competent to prove the execution of certain receipts for water purchased by the plaintiffs, as tending to show the existence of the company, and that it had actually located and was in operation at the time the receipts purport to be signed. *Lone Star Co.* v. *West Point Co.*, 5 Cal. 447.

4. Where the complaint in an action to recover possession of a mining claim in a justice's court, contains an allegation of injury done and a prayer for damages, the latter should be disregarded or stricken out, and the plaintiff be allowed to try his right to the claim. *Van Etten* v. *Jilson*, 6 Cal. 19.

5. Justices of the peace have no jurisdiction in actions to recover damages in a sum over two hundred dollars for injury to a mining claim, or for its detention. *Van Etten* v. *Jilson*, 6 Cal. 19; *Small* v. *Gwinn*, 6 Cal. 449; *Freeman* v. *Powers*, 7 Cal. 105.

6. Where a mining company, not incorporated, forms a trading copartnership with an individual under a firm name, each member of the mining company is a member of the firm. *Rich* v. *Davis*, 6 Cal. 163.

7. Where one of the mining company acted as salesman of the firm, it cannot be pretended that he was a dormant partner whose acts would not bind the firm. *Ib.*

8. In an action for a mining claim, when the defendants asked for an instruction to the jury "that if the plaintiff had abandoned the claim and did not intend to return and work it before the commencement of the suit," and the court gave the instruction "subject to the seventeenth section of the statute of limitations:" held, that the qualification to the instruction was error. *Davis* v. *Butler*, 6 Cal. 511.

9. A bill of sale, not under seal,* is insufficient to convey a mining claim. *McCarron* v. *O'Connell*, 7 Cal. 153; *Clark* v. *McElvy*, 11 Cal. 160.

*The statute of 1860, p. 175, permits bills of sales of mining claims without seal to pass the title.

10. The removal of gold from a mining claim is emphatically taking away the entire substance of the estate, and comes within that class of trespass in which injunctions are now universally granted. *Merced Mining Co.* v. *Fremont*, 7 Cal. 327.

11. Where the owner of a mining claim contracts verbally with J. for the working thereof, and agrees to pay him a certain sum out of the proceeds of the mine, and J. goes into possession thereof, and while he is working it the owner sells it to a third party, who takes notice of J.'s contract: held, that his claim is not subject or liable to J.'s contract. *Jenkins* v. *Redding*, 8 Cal. 603.

12. The interest of a miner in his min ing claim is property, and not having been exempted by law, may be taken on execution. *McKeon* v. *Bisbee*, 9 Cal. 142.

13. Where two several mining companies agree upon a boundary line between the claims of the two companies, and subsequently two other parties purchase the several interests of the two companies, with a knowledge of the boundary line so fixed, both parties are concluded by it, and are estopped from denying the line. *McGee* v. *Stone*, 9 Cal. 606.

14. The law will not presume an abandonment of property in a dam and ditch for mining purposes from the lapse of time. *Partridge* v. *McKinney*, 10 Cal. 183.

15. Parties taking possession of a quartz lead under an agreement made with another party, cannot retain possession and refuse compliance with their agreement made in consideration of such possession and right to the lead. *Hitchens* v. *Nougues*, 11 Cal. 36.

16. Where such parties conveyed to H. one-third interest in the lead, by deed purporting to convey in the fee simple absolute, and subsequently acquired another title: held, that such subsequent acquisition of title inured to H.'s benefit. *Ib.*

17. Possession of one partner or tenant in common of a mining claim is the possession of all. *Waring* v. *Crow*, 11 Cal. 371.

18. The purchaser of a mining claim can only acquire by such purchase such right or title as his vendor had at the time of the sale. *Ib.*

19. The whole course of legislation and

judicial decisions in this State since its organization has recognized a qualified ownership of the mines in private individuals. *State of California* v. *Moore*, 12 Cal. 70.

20. In an action of trespass for entering upon the mining ground of plaintiff and digging the same up and converting the gold-bearing earth, the vendor of the plaintiff is a competent witness, although a part of the purchase money is still due him. *Rowe* v. *Bradley*, 12 Cal. 230.

21. The mere fact that the judgment debtor (against whom execution had issued) was found upon the mining ground of plaintiff, did not justify the sheriff who had the execution in going on the ground and digging up the soil and taking the gold it contained. *Ib.*

22. Work done outside of a mining claim with intent to work the claim, to be considered by intendment as work done on the claim, must have direct relation and be in reasonable proximity to it. *McGarrity* v. *Byington*, 12 Cal. 432.

23. A bill of sale of a mining claim is sufficiently proven when the handwriting of the subscribing witness, who is absent from the State, and the execution by the vendor are proven. *Jackson* v. *Feather River Water Co.*, 14 Cal. 22.

24. A steam engine and boiler fastened to a frame of timber, bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. *Merritt* v. *Judd*, 14 Cal. 54.

25. Ejectment for mining ground, the parties being owners of claims on opposite sides of the same hill. Plaintiffs were an ordinary joint stock company, or common partnership, and claimed by purchase and transfer from the original members of the company. The practice of the company was to issue to members certificates of stock, and those certificates constituted the only evidence of membership recognized by the company, transfers being made by an assignment of the certificates, and a notice thereof in the books of the company. On the trial, these certificates with the assignments were read in evidence by plaintiffs to show their interest in the ground and their right to maintain the action, defendants objecting to them on the ground of irrelevancy, and that their execution was not proved: held, that the certificates, etc., were relevant to show possession in plaintiffs, but that their execution should have been proven. *Pennsylvania Mining Co.* v. *Owens*, 15 Cal. 136.

26. In this case the court instructed the jury: 1st, that if they found plaintiffs located their claims as now claimed before the location of defendants' claim, then they should find for plaintiffs; and 2nd, if they found that defendants never located any claim adjoining plaintiffs' claim, then they should find for plaintiffs: held, that the instructions are wrong, as violating the principle that plaintiff must recover on the strength of his own title; that defendants, having been in actual possession for a long time, were not required to show anything beyond it until a prior and paramount right was shown in plaintiffs; that it was not essential to defendants' possession to show that they had ever formally located their claim in accordance with any mining regulations, or that they had or claimed any other mining ground. *Ib.*

27. A party who permits himself to stand on the books of a water company, incorporated under the statutes of this State, as a stockholder, and holds the office of secretary—to which no person but a stockholder is eligible—is not a competent witness for the company in an action against it for overflowing plaintiffs' mining claim. He is liable for the debts of the company, and therefore interested. *Wolf* v. *St. Louis Independent Water Co.*, 15 Cal. 320.

28. Defendant killed deceased while in the act of injuring a mining claim. On the trial defendant offered to show that he was the owner, and in the lawful possession of said claim at the time of the killing. The court refused testimony to this point: held, that defendant had a right to prove his ownership of the claim for the purpose of showing his mental condition, the motives which prompted his action, and determining the character of the offense; that the ownership was part of the res gestæ, and should have been admitted, subject to instructions of the court as to its legal effect, though when admitted it may not have amounted to a justification. *People* v. *Costello*, 15 Cal. 353.

II. Mineral Lands.

29. The mines of gold and silver in the public lands are as much the property of the State, by virtue of her sovereignty, as are similar mines in the hands of private proprietors. *Hicks* v. *Bell*, 3 Cal. 227.

30. The State, therefore, has the sole right to authorize the mines to be worked, to pass laws for their regulation, to license miners, and affix such terms and conditions as she may deem proper to the freedom of their use. *Ib.*

31. The act of April, 1852, gives permission to all persons to work the mines upon public land, notwithstanding they may be in the possession and enjoyment of another for agricultural purposes. *Stoakes* v. *Barrett*, 5 Cal. 39.

32. The mines of gold and silver in this State are the property of the State, and the policy of her administration permits all persons to work for these metals. *Ib.*

33. The government of the United States will issue no patent to a preëmption claimant upon mineral land who claims the same for agricultural purposes. *McClintock* v. *Bryden*, 5 Cal. 99.

34. The government of this State being a government of the people, has, as far as its action has been determined, modified the claim to the precious metals by the sovereign, and permitted its citizens and others to use the public lands for the purpose of extracting the most valuable metals from their soil. *Ib.*

35. A person who has settled for agricultural purposes upon any of the mining lands of this State has settled upon lands subject to the rights of miners, who may proceed in good faith to extract any valuable metal there may be found in the lands so occupied by the settler, to the least injury of the occupying claimant. *Ib.* 102.

36. Miners have a right to dig for gold on the public lands. *Irwin* v. *Phillips*, 5 Cal. 143.

37. The miner who selects a piece of ground to work must take it as he finds it, subject to prior rights, which have an equal equity on account of an equal recognition from the sovereign power. *Ib.* 147.

38. In permitting miners to go upon public lands occupied by others, it has legalized what would otherwise have been a trespass, and the act cannot be extended by implication to a class of cases not specially provided for. *Fitzgerald* v. *Urton*, 5 Cal. 309; *Burdge* v. *Underwood*, 6 Cal. 46; *Weimer* v. *Lowery*, 11 Cal 112.

39. Persons settled in good faith upon lots in the mining towns, and carrying on business, should be reasonably protected, and not left to a fear of invasion on the specious pretext of mining. *Fitzgerald* v. *Urton*, 5 Cal. 310.

40. Settlers may occupy public lands and enclose the same for their immediate benefit, except in the mining regions, else the entire gold region might have been enclosed in large tracts under the pretense of agriculture and grazing. *Tartar* v. *Spring Creek W. and M. Co.*, 5 Cal. 398.

41. The right to mine for the precious metals can only be exercised upon public lands, and although it carries with it the incidents of the right, such as the use of wood and water, those incidents also must be of the public domain. *Ib.* 399.

42. The fact that the parties in possession of a gold mine are foreigners, and have not obtained a license, affords no apology for trespassers. The State alone can enforce the law prohibiting foreigners from working in the mines without a license. *Mitchell* v. *Hagood*, 6 Cal. 148.

43. The government of the United States, in the face of the notorious occupation of the public lands in this State by her citizens—that upon those lands they have mined for gold, constructed canals, built saw mills, cultivated farms and practiced every mode of industry, has asserted no right of ownership to any of the mineral lands in the State. *Conger* v. *Weaver*, 6 Cal. 556.

44. The right, like digging gold, is a franchise, and the attending circumstances raise the presumption of a grant from the sovereign of the privilege, and every one who wishes to attain it has license from the State to do so; provided, that the prior rights of others are not infringed upon. *Ib.* 558.

45. The act of May 3d, 1852, makes no reservation of mineral lands, and there is no prohibition against locating school land warrants on any of the mineral lands in the State. *Nims* v. *Johnson*, 7 Cal. 113.

46. The current and spirit of the legis-

lation of the State and federal government, taken in connection with the history and known circumstances of the country, the conclusion is irresistible, that the mines are occupied and worked, with the clear assent and encouragement of both the federal and State governments. *Merced Mining Co.* v. *Fremont*, 7 Cal. 326.

47. In an action by a company of miners to recover possession of a mining claim and damages for its detention, a person who was a member of the company at the time of the alleged detention, and who prior to the commencement of the suit, in consideration of unpaid assessments, sold his interest to his copartners in the claim, without warranty, is not a competent witness, as he is interested in the damages sought to be recovered. *Packer* v. *Heaton*, 9 Cal. 571.

48. A party cannot, under pretense of holding land in exclusive occupancy as a town lot, take up and enclose twelve acres of mineral land, in a mining district, as against persons who subsequently enter upon the land in good faith for the purpose of digging gold therein, and who, in such operations, do no injury for the comfortable use of the premises as a residence, or for the carrying on of any mechanical or commercial business. *Martin* v. *Browner*, 11 Cal. 14.

49. In an action of ejectment to recover an undivided interest in a mining claim, it is not necessary to make parties defendant in such action, who are in possession of such claim, holding other undivided interests, and who claim no right to the interest sued for. *Waring* v. *Crow*, 11 Cal. 371.

50. Mining claims are real estate, within the code defining the venue of civil actions. *Watts* v. *White*, 13 Cal. 324.

51. Upon questions as to the occupancy of public mineral land, it seems that a transfer of the occupant's right of possession may as well be by simple agrement as by deed, the vendee taking possession. *Jackson* v. *Feather River and Gibsonville Water Co.*, 14 Cal. 22.

52. From an early period of our State's jurisprudence we have regarded claims to public mineral lands as titles. *Merritt* v. *Judd*, 14 Cal. 64.

53. A license to work the mines implies a permission to extract and remove the mineral. Such license from an individual owner can be created only by writing, and from the general government only by act of Congress. But Congress has adopted no specific action on the subject, and has left that matter to be controlled by its previous general legislation respecting the public domain. The supposed license from the general government, consists in its simple forbearance. *Boggs* v. *Merced Mining Co.*, 14 Cal. 374.

54. If the forbearance of the government were entitled to any consideration, as a legal objection to the assertion of the title of the government, it could only be so in those cases where it has been accompanied with such knowledge on its part, of the working of the mines and the removal of the mineral, as to have induced investigation and action, had this been intended or desired. Such knowledge must be affirmatively shown by those who assert a license from forbearance. *Ib.* 375.

55. The presumption of a grant from the government of mines, water privileges and the like, is to the first appropriator; but such a presumption can have no place for consideration against the superior proprietor. *Boggs* v. *Merced Mining Co.*, 14 Cal. 375; *Henshaw* v. *Clark*, 14 Cal. 464.

56. The United States, like any other proprietor, can only exercise their rights to the mineral on private property, in subordination to such rules and regulations as the local sovereign may prescribe. *Boggs* v. *Merced Mining Co.*, 14 Cal. 376.

57. The general course of legislation in this State, authorizes the inference of a license from her to the miner to enter upon lands and remove the gold, so far as the State has any right; but this license is restricted to the public lands. *Ib.* 376.

58. The possession of agricultural land is prima facie proof of title against a trespasser; but where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burdge* v. *Smith*, 14 Cal. 383.

59. How far the right of miners to go upon public mineral lands in possession of another, for the purpose of mining, must be modified to secure any rights of such possessor, reserved. *Ib.*

60. Neither the act of 1858, as to the

location of seminary land, nor the act of Congress donating it, allows mineral land to be located. *Ib.*

61. Miners have a right to enter upon public mineral land, in the occupancy of others, for agricultural purposes, and to use the land and water for the extraction of gold—the use being reasonable, necessary to the business of mining, and with just regard to the rights of agriculturist. And this, whether the land is inclosed, or taken up under the possessory act. *Clark* v. *Duval*, 15 Cal. 88.

62. The right so to enter and mine, carries with it the right to whatever is indispensable for the exercise of this mining privilege—as the use of the land, and such elements of the freehold or inheritance as water. *Ib.*

63. When a party enters upon mineral land for the purpose of mining, he cannot be presumed to be a trespasser; for if the land be not private property, he has the right to enter upon it for that purpose; and until it be shown that the title has passed from the goverument, the statutory presumption that it is the public land, applies. *Smith* v. *Doe*, 15 Cal. 105.

64. Mere entry and possession give no right to the exclusive enjoyment of any given quantity of public mineral lands of the State. *Ib.*

65. In ejectment for mineral lands, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, were insufficiently denied in the answer; but the answer averred affirmatively, that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States, contained large and valuable deposits of gold, that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The court below gave judgment for plaintiff on the pleadings: held, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings, because the character of his possession did not appear, the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever. *Ib.*

66. The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining. *Ib.*

67. As a general rule, the public mineral lands of the State are open to the occupation of every person who, in good faith, chooses to enter upon them for the purpose of mining. *Ib.* 106.

68. But this rule has its limitations, to be fixed by the facts of each particular case. Certain possessory rights, and rights of property in the mining region, though not founded on a valid legal title, will be protected against the miner—as valuable permanent improvements, such as houses, orchards, vineyards, growing crops, etc. *Ib; Gillan* v. *Hutchinson*, 16 Cal. 155.

69. In ejectment for an interest in a mining claim, the answer being a general denial, defendant cannot defeat the action by showing the claim to be partnership property. Any rights defendant may have in the premises, growing out of the partnership, must be asserted in equity, particularly as the legal title in this case is in the plaintiff. *Lowe* v. *Alexander*, 15 Cal. 302.

70. Where, in suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer denies such title, plaintiff must prove his title as averred, at least in substance, and he cannot, against defendant's objection, recover on another and different title. And where plaintiffs were permitted to prove and recover on a title other than the one so set up, it was error in the court below to refuse a new trial, the motion for which was based on affidavit of defendant that he was taken by surprise arising out of the frame of the pleadings, and that he could have rebutted plaintiffs' case but for this surprise. *Eagan* v. *Delaney*, 16 Cal. 87.

71. The act of April 25th, 1855, for the protection of growing crops and improvements in the mining districts of this State, so far as it purports to give a right of en-

try upon the mineral lands of this State, in cases where no such right existed anterior to its passage, is invalid. *Gillan* v. *Hutchinson*, 16 Cal. 155.

72. This act of 1855 seems to proceed upon the idea of an absolute and unconditional right in the miner to enter upon the possessions of another for mining purposes, and the intention of the act was to limit this supposed right, and not to give a right of entry in cases where no such right previously existed. Miners have no such absolute and unconditional right. The true rule is laid down in *Smith* v. *Doe*, 15 Cal. 100. *Gillan* v. *Hutchinson*, 16 Cal. 155.

73. In this State, although the larger portion of the mineral lands belong to the United States, yet defendant cannot defeat an action for mining claims, water privileges and the like, by showing the paramount title of the government. Our courts, in determining controversies between parties thus situated, presume a grant from the government to the first appropriator. The presumption, though of no avail against the government, is held absolute in such controversies. *Coryell* v. *Cain*, 16 Cal. 573.

See LAND.

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1. *Rights of Miners.*

74. Where plaintiff's mining claim was overflowed by means of a dam erected by the defendants, the court ordered a reduction of the dam, so as to prevent the overflow, or if necessary an entire abatement. *Ramsay* v. *Chandler*, 3 Cal. 93.

75. The obstruction of the water in a ravine is common injury to many at work upon the ravine, who had by the necessary implication of the laws of the State which relate to mines and miners, a species of property in their mining grounds which they had a right to protect by peaceably abating the nuisance. *Stiles* v. *Laird*, 5 Cal. 122.

76. Rights of miners are to be protected in the possession of their selected localities, and the rights of those who by prior appropriation have taken the waters from their natural beds, and by costly works to supply the necessities of gold diggers, and without which the most important interest in the mineral region would remain undeveloped. *Irwin* v. *Phillips*, 5 Cal. 146.

77. A miner has no right to dig or work within the enclosure surrounding a dwelling house and other improvements of another. *Burdge* v. *Underwood*, 6 Cal. 46.

78. A prior locator of a mining claim, on the bank of a stream, has the right to the use of the bed of the stream for the purpose of fluming or working his claim; and any subsequent erection, dam or embankment which will turn the water back upon such claim, or hinder it from being worked with flumes, or other necessary means or appliances, is an encroachment upon the rights of said party, and he is entitled to recover the damages consequent on such obstructions. *Sims* v. *Smith*, 7 Cal. 149.

79. Under existing legislation, the owner of a mining claim has, in practical effect, a good vested title to the property, and should be so treated until his title is divested, by the exercise of the higher right of his superior proprietor. His right to protect the property, for the time being, is as full and perfect as if he were the tenant for years, or for life, of his superior proprietor. As his lease is of the mine, he is entitled to all the remedies, for its protection, that he could claim if he were the owner, against all the world, except the true owner. *Merced Mining Co.* v. *Fremont*, 7 Cal. 320.

80. A writ of injunction will lie, to restrain trespass, in entering upon a mining claim, and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy at law. *Ib.* 322.

81. Where the plaintiff sued for an injury to his mining claim, by the breaking of defendant's canal, which was constructed prior to the location of plaintiff's claim, neither party claiming ownership of the soil, and no negligence in fact being shown, other than that which the law would presume from the breaking of the ditch: held, that the rights of the parties were acquired at the dates of their respective locations, and the rule of "coming to a nuisance" may be applied. *Tenney* v. *Miners' Ditch Co.*, 7 Cal. 339.

82. There is no doubt that ditch owners would be responsible for wanton injuries

or gross negligence, but they are not liable for a mere accidental injury, where no negligence is shown, to a miner locating along the line subsequent to the construction of the ditch. *Ib.* 340.

83. The first appropriator of water for mining purposes is entitled to have the water flow without material interruption in its natural channel. *Bear River and Auburn W. and M. Co.* v. *New York Mining Co.*, 8 Cal. 333.

84. Where a place of deposit for tailings is necessary for the working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be necessary for this purpose; provided, he does not interfere with preëxisting rights. *Jones* v. *Jackson*, 9 Cal. 244.

85. The pay dirt and tailings of a miner, which are the productions of his labor, are his property. *Ib.*

86. If a miner allows his tailings to mingle with those of other miners, this would not give a stranger a right to the mixed mass; and where tailings are allowed to flow upon the land of another, he is entitled to them. *Ib.* 245.

87. One party may locate ground in the mineral districts for fluming, and another party, at the same or a different time, may locate the same ground for mining purposes; the two locations being for different purposes will not conflict. *O'Keiffe* v. *Cunningham*, 9 Cal. 590.

88. A party may take up a claim for mining purposes that has been and still is used as a place of deposit for tailings by another, and his mining right may be subject to this prior right of deposit; but this claim of the miner will not be subject to those who come after him. *Ib.* 591.

89. Plaintiff owned certain mining claims and quartz leads on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water on to plaintiffs' claims and thus prevent them from working them, and would also destroy their water privilege for a quartz mill which they intended to construct: held, that the action was premature, and that the demurrer to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained. *Harvey* v. *Chilton*, 11 Cal. 120.

90. In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam and the consequent washing away of the pay dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler* v. *Sears Union Water Co.*, 12 Cal. 558.

91. Miners have no right to enter upon private land and subject it to such uses as may be necessary to extract the precious metals which it contains. *Henshaw* v. *Clark*, 14 Cal. 464.

92. Plaintiffs owned certain mining claims in the bed or channel of a stream. Defendants owned claims in the same stream above and adjoining the claims of plaintiffs, defendants' claim being located first. Defendants constructed a flume, running from their own claims to and upon plaintiffs' claims, and through this flume a large quantity of tailings was deposited on plaintiffs' claims, to their great damage. The flume was constructed for the purpose of working defendants' claims; was proper and necessary for that purpose, and the deposit of tailings was occasioned by the ordinary working of the claims. The court instructed the jury, that the person first locating a claim in the bed of a stream is entitled to the channel below as an outlet, and that when such outlet, from the usual mining operations above, becomes obstructed, he may open the same; and if he can do so by no other means, may construct a flume down the channel as far as necessary, and as far as it can be constructed without considerable damage to claims subsequently located: held, that the instruction was wrong; that the defendants were not entitled, as matter of strict legal right, to an easement upon plaintiffs' claims for the purposes mentioned; that the doctrine that, under certain circumstances, one person way have a right of way by necessity over the land of another, does not apply to this case; and further, that this court does not recognize the doctrine that one person can go on the land of another and erect thereon buildings or other structures; and that mining claims stand on the same footing in this respect as other property; that if the acts of defendants were authorized by

any local custom or regulation, its existence should have been averred and proved. *Esmond* v. *Chew*, 15 Cal. 142.

93. Each person mining in the same stream is entitled to use, in a proper and reasonable manner, both the channel of the stream and the water flowing therein. Where, from the situation of different claims, the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be damnum absque injuria, and will furnish no cause of action to the party injured. The reasonableness in the use is a question for the jury, to be determined by them upon the facts and circumstances of each particular case. *Ib.*

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2. *Notice of Claim.*

94. A misdescription in the notice of the claimant to a quartz lead, posted up near the premises, in pursuance of the requirement of the mining laws in the district in which the lead is situated, and where the lead is underground and undeveloped, will not vitiate the claim. *Johnson* v. *Parks*, 10 Cal. 448.

95. The question as to the necessity of recording mining claims, reserved. *Partridge* v. *McKinney*, 13 Cal. 159.

96. A copy of a notice posted on a mining claim to show its extent is not admissible in evidence, if the notice itself be attainable. Such evidence is secondary, and is admissible only upon the terms which control its introduction in other cases. *Lombardo* v. *Ferguson*, 15 Cal. 373.

III. Mining Rules.

97. Actual possession of a portion of a mining claim, according to the custom of miners, in a given locality in the Yuba river, extends by construction to the limits of the claim held in accordance with such customs. *Hicks* v. *Bell*, 3 Cal. 224.

98. The code permits evidence of the customs established in mining claims, which implies a permission on the part of the State to the miner to seek wherever he choose in the mines for the precious metals, and extends to him whatever right the State might have to the mineral when found. *Mc Clintock* v. *Bryden*, 5 Cal. 100.

99. Mining laws, when introduced in evidence, are to be construed by the court, and the question whether by virtue of such laws a forfeiture had accrued is a question of law, and cannot, therefore, be properly submitted to a jury. *Fairbanks* v. *Woodhouse*, 6 Cal. 435.

100. In absence of mining regulations, the fact that a party has located a claim bounded by another raises no implication that the last located claim corresponds in size, or in the direction of its lines, with the former. *Live Yankee Co.* v. *Oregon Co.*, 7 Cal. 42.

101. Where the regulations of a mining locality require that every claim shall be worked two days in every ten: held, that the efforts of the owners of a claim to procure machinery for working the claim are by fair intendment to be considered as work done on the claim. *Packer* v. *Heaton*, 9 Cal. 570.

102. Where a party's rights to a mining claim are fixed by the rules of property, which are a part of the general law of the land, they cannot be divested by any mere neighborhood custom or regulation. *Waring* v. *Crow*, 11 Cal. 372.

103. Where the original records of mining claims of a certain district have been destroyed by fire, and the miners, by a resolution subsequently passed, required the claims to be recorded anew in a new book, such book may be admitted as evidence in the trial of an ejectment case for a mining claim, to show that the rules of vicinage had been complied with. *McGarrity* v. *Byington*, 12 Cal. 430.

104. The right to a mining claim vests by the taking according with local rules, and in the absence of any custom or local regulation, the right of property once attached in a mining claim does not depend upon mere diligence in working such claim. *Mc Garrity* v. *Byington*, 12 Cal. 431; *Dutch Flat Mining Co.* v. *Mooney*, 12 Cal. 535.

105. The failure to comply with any one mining regulation is not a forfeiture of title. It would be enough to hold the forfeiture as a result of noncompliance with such of them as make a noncompliance a cause of forfeiture. *Mc Garrity* v. *Byington*, 12 Cal. 431.

106. In an action of ejectment to recover mining claims, an answer to the complaint which avers "that any rights that plaintiffs may have ever had to the possession, etc., they forfeited by a noncompliance with the rules, customs and regulations of the miners of the diggings embracing the claim in dispute prior to the defendant's entry, is insufficient in not setting forth the rules, customs, etc. *Dutch Flat Water Co.* v. *Mooney*, 12 Cal. 534.

107. The first locator of a quartz lode is not confined simply to the solid quartz actually embodied in the bed rock, but is entitled to the loose quartz rock and decomposed material which were once a part of the lode, and are now detached, so far as the general formation of the ledge can be traced. *Brown* v. '49 *and* '56 *Quartz Mining Co.*, 15 Cal. 160.

108. The right of the quartz miner comes from his appropriation, and whenever his claim is defined there is no reason in the nature of things why the appropriation may not as well take effect upon quartz in a decomposed state as any other sort, or why the condition to which natural causes may have reduced the rock should give character to the title of the locator. *Ib.* 160.

109. The only question of fact in this case being, whether the quartz rock—parted or not from its original connection—was a portion of the same quartz lode or claim taken up by defendant, it was not important whether the rock was upon or beneath the surface, or what its condition, provided it were a part of such lode or claim. *Ib.* 161.

110. In cases of this kind, the custom of miners is entitled to great, if not controlling weight. *Ib.*

111. Under certain circumstances, proof of the custom in other districts may be proper—at least, this court is not satisfied to the contrary. But in this case, the admission of such testimony, if error, was immaterial, as the case was tried by the court, and the judgment placed on independent ground, upon which it can stand. *Ib.*

112. In suit for mining claims, the court permitted defendants to introduce in evidence the mining rules of the district, though adopted after the rights of plaintiff had attached: held, that admitting plaintiffs' rights could not be affected by such rules, still, as defendants claim under them, they were competent evidence to determine the nature and extent of defendants' claim—the effect of such rules upon pre-existing rights being sufficiently guarded by instructions of the court. *Roach* v. *Gray*, 16 Cal. 384.

See CUSTOM.

IV. TAXATION OF MINES AND MINERS.

113. The State can levy a poll tax to such extent as it might deem expedient upon all persons engaged in mining upon public lands, and there is nothing in the constitution of the United States which deprives this State of the power of imposing it. *People* v. *Naglee*, 1 Cal. 238.

114. Where the State passed a law taxing foreign miners until such time as Congress shall by law assume the regulation of the mines, it is not contradictory or repugnant to the power of Congress. *Ib.* 240.

115. Aliens cannot be said to have any property to enjoy in the mineral public lands by which the constitution of the State would guarantee them against taxation for working or extracting the metals therefrom. *Ib.* 252.

116. A tax upon aliens for working the public lands and extracting therefrom the precious metals does not require any exaction; the alien may pay or not, depending upon his option whether he will or will not engage in mining operations, and becomes a license fee. *Ib.* 253.

117. When a foreign miner, subject to a license tax, was employed by one of a partnership to work in the mines, which were the partnership property: held, that the employer, and not the partnership, was liable for the tax. *Meyer* v. *Larkin*, 3 Cal. 405.

118. There is no force in the objection that the value of a mining claim which depends upon the amount of the precious metals it contains, must necessarily be left to conjecture. The universal standard of value is the amount of money which can be realized by a sale of the property, and this will apply as well to mining claims as other lands. *State of California* v. *Moore*, 12 Cal. 71.

119. The Legislature having expressly

exempted mining claims from the operation of the revenue act, it cannot be presumed that it intended indirectly to subject them to taxation by levying a tax on the price paid for them. *State of California* v. *Moore*, 12 Cal. 72; *Hart* v. *Plum*, 14 Cal. 154.

120. Money invested in the purchase and opening of mining claims, is not within the provisions of that portion of the revenue act which provides for the levy of a tax on "all capital loaned, invested or employed in any trade, commerce or business whatsoever." *State of California* v. *Moore*, 12 Cal. 72.

121. The interest of the occupant of a mining claim is property, and under the constitution it is in the power of the legislature to tax such property, *State of California* v. *Moore*, 12 Cal. 69; *Hart* v. *Plum*, 14 Cal. 154.

See TAXATION.

See WATER COURSES.

MISDEMEANOR.

1. The supreme court has no appellate jurisdiction in cases of misdemeanor or crimes of a less degree than felony, and that no jurisdiction can be conferred by the statute in these cases. *People* v. *Applegate*, 5 Cal. 296; *People* v. *Shear*, 7 Cal. 140; *People* v. *Vick*, 7 Cal. 166; *People* v. *Cornell*, 16 Cal. 188.

2. On an indictment for an assault with intent to commit murder, defendant plead guilty to an assault with a deadly weapon with intent to commit bodily injury, and upon this plea was adjudged to pay a fine of $1,200, or be imprisoned in the county jail. Defendant appeals: held, that the supreme court has no jurisdiction of the appeal, the offense for which defendant was punished being a misdemeanor only, and not a felony. *People* v. *Cornell*, 16 Cal. 188.

See CRIMES AND CRIMINAL LAW.

MISJOINDER.

1. Misjoinder of parties can be corrected by amendment under the code. *Heath* v. *Lent*, 1 Cal. 142.

2. It seems that in law as in equity, the court may add to and strike out parties, and render a judgment against some defendants and in favor of others. *Rowe* v. *Chandler*, 1 Cal. 172.

3. A defendant may demur if there is a misjoinder, for the words "defects of parties" in the code mean a defect in the complaint by reason of having either too many or too few parties. *Ib.* 174.

4. If there is a misjoinder of parties, the objection should be taken by answer or demurrer, or it is waived. *Rowe* v. *Chandler*, 1 Cal. 175; *Warner* v. *Wilson*, 4 Cal. 313; *Jacks* v. *Cooke*, 6 Cal. 164; *Mott* v. *Smith*, 16 Cal. 557.

5. Where four persons were sued as codefendants on a joint contract, and the plaintiffs adduced no evidence to establish the joint liability of all, and a motion for a nonsuit was made on this ground but refused by the court, and judgment was rendered against all the defendants jointly: held, that the judgment was erroneous, and that the plaintiffs might have discontinued the suit as against those not shown to be liable, and have proceeded to judgment against those whose liability was established, upon such terms and conditions as should appear to be just. *Acquittal* v. *Crowell*, 1 Cal. 192.

6. Where it is clear that two or more defendants are not jointly liable, a joint judgment against both cannot be sustained, although each may be severally liable: so held, in an action by a lessor against two subtenants of his leasee, when it appeared that the subtenants did not occupy any portion of the premises jointly. *Pierce* v. *Minturn*, 1 Cal. 472.

7. The misjoinder of two persons as codefendants who have no joint interest in the subject matter of the suit and are under no joint liability, will, unless the mistake be corrected in the court below, be error. *Sterling* v. *Hanson*, 1 Cal. 480.

8. A defendant cannot object to the misjoinder of a plaintiff, and after forcing him to be omitted in the amendment object to the nonjoinder. *Powell* v. *Ross*, 4 Cal. 198.

9. The objection to the misjoinder of a defendant must be taken in the court below; it cannot be taken in the appellate court for the first time. *Sands* v. *Pfeiffer*, 10 Cal. 265.

10. Where T. & C. executed a joint lease to L. of certain premises, and it was specified in the lease that twenty dollars rent should be paid to T. and twenty dollars to C., and on breach of the terms of the lease on the part of the lessee, T. and C., the lessors, brought a joint suit to recover restitution of the premises and damages for their detention: held, that there was no misjoinder of parties plaintiff. *Treat* v. *Liddell*, 10 Cal. 303.

11. A question of misjoinder or want of common interest in the subject of the suit should, if it appeared by the plaintiff's evidence, have been taken by motion for nonsuit, or upon instructions. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 13 Cal. 238.

See ACTIONS, JOINDER OF, MISJOINDER.

MISSIONS.

1. It seems that in the year 1833 the property of the missions in California was confiscated by the government, except limited portions reserved for religious purposes, and that in carrying into execution this law of confiscation, the officers of the Mexican government took possession of the lands and property of the Mission Dolores, except a small portion reserved. *Santillan* v. *Moses*, 1 Cal. 94.

2. According to all the Spanish and Mexican authorities, the missions were political establishments, and in no manner connected with the church. *Nobili* v. *Redman*, 6 Cal. 342.

3. The mission establishments arose directly from the action and authority of the government of the country; laws and regulations were made for them by its legislative authority without referring to or consulting the authority of the church. *Ib.*

4. Where land within the limits of the pueblo of San Francisco, and also within the limits of the old mission, was granted to an individual by the governor and departmental assembly in 1839–40, before the "mission" had been entirely secularized, it would seem to have been, at the date of the grant, exempt from the exercise of pueblo rights over it, and must be grantable, just as any other land previously occupied by the mission establishments, but not exclusively dedicated to pious uses. *Brown* v. *City of San Francisco*, 16 Cal. 457.

See ALCALDE, GRANT, LAND, PUEBLO.

MISTAKE.

1. Courts of equity will set aside awards for fraud, mistake or accident. An award may be set aside for a mistake of law when it appears on the face of the award. *Muldrow* v. *Norris*, 2 Cal. 77; *Tyson* v. *Wells*, 2 Cal. 130; *Peachy* v. *Ritchie*, 4 Cal. 207.

2. Where, in the settlement of a partnership, a mistake occurs, and both parties were ignorant, or had equal knowledge of, or equal opportunities of knowing the mistake, and there had been no fraud or concealment, equity will not correct the mistake. *Bell* v. *Mehen*, 2 Cal. 159.

3. Delivery to a wrong person by mistake or by gross imposition, will not discharge his responsibility to the owner for the value of the goods. *Adams* v. *Blankenstein*, 2 Cal. 418.

4. No alteration or erasure will defeat the recovery upon a bond, when the same was made to correct a mistake, unless it materially affects the rights or condition of the obligor, or is the result of a fraudulent intent to effect the same object. *Turner* v. *Billagram*, 2 Cal. 522.

5. If money be paid by mistake of law and not of fact, the court cannot relieve the party. *Smith* v. *McDougal*, 2 Cal. 587.

6. A slight error in the title of a cause, where there is no prior suit pending between the same parties, will not invalidate a notice. *Mills* v. *Dunlap*, 3 Cal. 96.

7. Where the summons was headed with the words "district court," but was issued out of the county court, under the county court seal, and tested by the judge of the county court, it was held good as a writ of the county court. *Crane* v. *Brannan*, 3 Cal. 195.

8. Where, in a contract, a mistake occa-

sions loss, it must be suffered by him who made it. *Burgoyne* v. *Middleton*, 4 Cal. 66; *Mc Gee* v. *Stone*, 9 Cal. 607.

9. A mistake by the omission of the words "to pay to" will not invalidate the obligation of an appeal bond. *Billings* v. *Roadhouse*, 5 Cal. 71.

10. A garnishee should be allowed to amend his answer wherever it appears that he has committed a mistake or fallen into an error which could not reasonably have been avoided. *Smith* v. *Brown*, 5 Cal. 119.

11. A mere clerical error in the judgment, not affecting the appellant, can be corrected, and is not ground for reversal. *Anderson* v. *Parker*, 6 Cal. 201.

12. Mistake as well as fraud, in any representation of fact material to the contract, furnishes a sufficient ground to set it aside, and declare it a nullity. *Alvarez* v. *Brannan*, 7 Cal. 510.

13. A mistake in the date of the judgment, as stated in the notice of the appeal, which is served on respondent, was not material, and the notice is sufficient. *Sherman* v. *Rolberg*, 9 Cal. 18.

14. A mistaken advice of counsel to his client not to prepare for trial, is no ground for a continuance. *Musgrove* v. *Perkins*, 9 Cal. 212.

15. Accounts stated may be opened and the whole account taken de novo for gross mistake in some cases. *Branger* v. *Chevalier*, 9 Cal. 361.

16. The mistake of counsel as to the competency of a witness, is no ground for granting a new trial. *Packer* v. *Heaton*, 9 Cal. 571.

17. Where one of two innocent parties must suffer, he who committed the mistake must bear the loss. *Mc Gee* v. *Stone*, 9 Cal. 607.

18. Where a notary did not faithfully perform his duty, in taking an acknowledgment, but was guilty of gross and culpable negligence, by a mistake made therein, he is responsible to the party injured for the damages resulting from this negligence. *Fogarty* v. *Finlay*, 10 Cal. 245.

19. To a complaint verified the defendant filed a copy of the original verified answer by mistake; parties took depositions under the pleading, and subsequently went to trial; after the close of the plaintiff's evidence, his counsel then for the first time brought the mistake to the notice of the court, by moving for judgment by default, which motion the court sustained, and refused to allow defendant then to verify his answer: held, that the court erred, and should have allowed the defendant to have verified his answer. *Arrington* v. *Tupper*, 10 Cal. 464.

20. A mistake in the date of a sheriff's return may be corrected at any time. *Ritter* v. *Scannell*, 11 Cal. 249.

21. After taking an acknowledgment, and making and delivering his return, the functions of a notary cease, and he is discharged from authority, and cannot alter or amend his certificate where there is a mistake. *Bours* v. *Zachariah*, 11 Cal. 297.

22. The omissions of the words "be sold," in a judgment of foreclosure, after the description of the premises, is a mere clerical error, which will not affect the judgment. *Moore* v. *Semple*, 11 Cal. 361.

23. Equity will relieve against mistake, as well as fraud, in a deed or contract in writing, and parol evidence is admissible to show the mistake; but where it appears upon the face of the instrument itself, courts will correct the mistake without evidence aliunde. *Wagenblast* v. *Washburn*, 12 Cal. 212.

24. A judgment will not be set aside on the application of a creditor of the judgment debtor, upon the ground that the judgment was taken for more than was actually due upon the note, when it appears that a mistake of a few cents only was made in calculating the interest due upon the note. *Ziel* v. *Dukes*, 12 Cal. 482.

25. A slight mistake in the computation of interest, the date being given, is no evidence of fraud. *Scales* v. *Scott*, 13 Cal. 78.

26. The authority of an attorney, who appears, will be presumed, and his action will bind the party, unless in cases of fraud or insolvency of the attorney. Nor will such action be reviewed on the ground of mistake, unless the mistake be unmixed with any fault or negligence of either the party or his attorney. *Holmes* v. *Rogers*, 13 Cal. 201.

27. There is no error in permitting the mistake in the recital of the bond, as to the amount for which the attachment issued, to be explained and corrected by parol evidence. *Palmer* v. *Vance*, 13 Cal. 556.

28. Where judgment is entered, against "the defendants," some of whom were

not sued, though their names appeared as defendants, by a mistake of the clerk in entitling the cause, the error may be corrected in the supreme court, or the court below, on motion. *Browner* v. *Davis*, 15 Cal. 11.

29. Warrants drawn by the controller of State, delivered to the payees thereof, and by them endorsed in blank, were presented by the holders to the State treasurer, and on payment were delivered to him. They were afterwards stolen from the office of the treasurer. The warrants, on their face indicating a just and legal claim against the State, came into the hands of the defendants, ignorant that they had been stolen. Defendants present them to the treasurer, and in lieu thereof receive State bonds payable to bearer, under the funding act of 1857, and part with them. The State sues for the bonds or their value: held, that the action does not lie; that defendants having received the bonds bona fide, and without fraud, for warrants apparently good against the State, are not liable in this form of action. The mere reception of the bonds, though issued by mistake, does not render defendants liable. *State of California* v. *Wells*, 15 Cal. 343.

30. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other poperty which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner, from the like general obligation. *City of San Francisco* v. *Argenti*, 16 Cal. 282.

31. February 26th, 1855, Page, Bacon & Co. were indebted to plaintiff, and the debt was due. That firm being then unable to pay, an agreement was made between them and plaintiff, dated on that day, by which an extension was to be given the firm of two, four, six and eight months from date—the debt to be paid in equal installments. In consideration of this extension, defendant and others signed and delivered to plaintiff an instrument, dated February 26th, 1855, guaranteeing the payment by P., B. & Co. of such indebtedness in the installments, and at the different times, in said agreement and certificate set forth, conditioned to be void when said certificates were fully paid. In fact, said agreement did not mention certificates. March 13th, 1856, P., B. & Co. issued to plaintiff certificates for his indebtedness in installments, at two, four, six and eight months from that date: held, that defendant is liable on his guaranty, which was to pay at the times mentioned in the agreement; that plaintiff having taken certificates, dated March 13th, 1856, thereby extended the time of payment, and released defendant, who was a mere surety. Plaintiff is not entitled to relief on the ground of mistake, which was of law, and not of fact. *Gross* v. *Parrott*, 16 Cal. 145.

32. D. and M. are owners each of one undivided one-half of certain real estate. D. executes a mortgage to plaintiffs upon his undivided half, which was recorded on the same day. Subsequently, D. and M. conveyed to defendant, E., an undivided one-third of the entire property—making D., M. and E. each owners of one undivided one-third—one-half of E.'s interest being subject to the mortgage to plaintiffs. Plaintiffs foreclose — making D. alone party—get judgment for the amount due, and a decree directing a sale of all the interest D. had at date of mortgage. At the sale, plaintiffs become the purchasers for the full amount of their judgment, costs, etc., and in due time receive a sheriff's deed, no redemption being made. Meantime, but subsequent to the decree, and before the sheriff's deed, E. purchases the remaining interest of D. and M. Plaintiffs sue for the sale of the property —a partition being impossible without prejudice—and for an account from the tenant in possession; and ask to be reimbursed from the proceeds of the sale the one-third of the amount bid by them at the sale under their decree of foreclosure, on the ground that the decree was invalid as to the one-sixth interest conveyed to E.; and that plaintiffs believed, at the time of their bid, they were acquiring a title to all the interest D. had at the date of his mortgage to them; and that the sheriff stated such interest was offered for sale: held, that plaintiff cannot be reimbursed in the amount bid, even though they acted under a mistake as to the effect of the decree and sale thereunder; that

their mistake was one of law, against which courts of equity seldom relieve in an independent action—the weight of authority in the United States being not to relieve, unless the mistake be accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence. *Goodenow* v. *Ewer*, 16 Cal. 470.

33. Held, also, that upon proper application in the original foreclosure suit, the court would have released the plaintiffs from the purchase, set the sale aside, and opened the decree, and allowed them to file a supplemental complaint, bringing in E. and others interested, as parties. *Ib.*

34. Courts of equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property, or the estate sold, provided application be made to them in the suits in which such decress are entered, within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others. *Goodenow* v. *Ewer*, 16 Cal. 470; *Boggs* v. *Hargrave*, 16 Cal. 565.

35. The nature and extent of the relief in such cases, are matters resting very much in the sound discretion of the court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or to the parties, to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply, and from such, courts of equity seldom relieve. *Goodenow* v. *Ewer*, 16 Cal. 470.

36. In this case relief cannot be granted, as no special circumstances are shown, and no excuse offered for neglecting to apply for relief in the original foreclosure suit. And further, this action is not brought directly for relief from the sale, but for a sale of the property, an account as incident to a partition, and distribution of the proceeds among the owners, tenants in common thereof; and D., the mortgagor, is not made a party. *Ib.* 471.

37. Where a purchaser at a sale under a decree, in a foreclosure suit, directing the sale of the premises—which decree was void, because the grantee of the mortgagor was not made party—brought suit against the mortgagees to recover back the money paid them on his bid: held, that the action does not lie—the purchaser being aware, at the time of his bid, that the mortgagor had sold the premises before the institution of the foreclosure suit, and there being no fraud. *Goodenow* v. *Ewer*, 16 Cal. 471; *Boggs* v. *Hargrave*, 16 Cal. 565.

38. The purchaser in such case makes a mistake of law as to the effect of the decree when the grantee of the mortgagor is not made party to the foreclosure suit. From such mistake no relief can be granted in an action at law. *Goodenow* v. *Ewer*, 16 Cal. 471; *Boggs* v. *Hargrave*, 16 Cal. 565.

39. Plaintiff must seek relief from the consequences of the invalidity of the decree, by proceedings in the foreclosure suit. By his act of purchase he has submitted himself to the jurisdiction of the court in that suit, as to all matters connected with the sale, and is entitled to apply for such relief as the facts of the case may justify. Upon his application, the court may direct the sale to be set aside and the satisfaction to be canceled, and authorizes a supplemental bill, for a resale of the premises, to be filed and conducted in the names of the complainants in that suit, for the plaintiff's benefit, and direct that the grantee of the mortgagor, and any other persons interested in the premises, be brought in as parties; or it may make such other and different order in the matter as will protect the rights of all parties, and mete out exact justice. *Goodenow* v. *Ewer*, 16 Cal. 471.

40. Equity will not, in an independent action, relieve from mistakes of law, unless accompanied with special circumstances, such as misrepresentation, undue influence or misplaced confidence. *Ib.*

MONEY HAD AND RECEIVED.

1. In an action for money had and received by a consignor, the amount of goods sold on credit by the consignee, having no authority so to sell, can be recovered; such sale must be taken as made for cash, and to the vendor belongs the demand created by the sale against the vendee, and the vendee is liable to the plaintiff for money had and received. *Johnson* v. *Totten*, 3 Cal. 347.

2. A count in a complaint for money had and received, which does not allege a demand, is bad. *Reina* v. *Cross*, 6 Cal. 31.

3. If parties were tenants in common, and the defendant sold chattels held in common and appropriated the proceeds to his own use, the remedy of the plaintiff is in trover, or by an action for money had and received; and an action for goods, wares and merchandise sold and delivered will not entitle him to a judgment. *Williams* v. *Chadbourne*, 6 Cal. 561.

4. A complaint alleging that the defendant collected and received certain money, as the agent *or* attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of a fraud and for judgment and execution against his person and property, is insufficient in this disjunctive form to sustain a verdict convicting the defendant of fraud. *Porter* v. *Hermann*, 8 Cal. 623.

5. Where money is paid upon compulsion, the law raises an obligation to refund, and the form of the action is for money had and received to the plaintiffs' use. The words "had and received to the plaintiffs' use," are put as the consideration upon which to support the assumpsit, on the part of the defendant. *McMillan* v. *Richards*, 9 Cal. 418.

6. Where one having a claim to collect agreed with another to take his claim against the common debtor and treat it as his own in any suit brought for the debt, costs and expenses to be shared pro rata, and afterwards prosecuted both claims to judgment in his own name, bought the property of the defendant on execution sale, and left it with an agent for sale, he is not liable to an action for money had and received, or in indebitatus assumpsit. *Herrick* v. *Hodges*, 13 Cal. 433.

7. An action for money had and received to the use of plaintiff lies whenever the defendant has in his hands money of plaintiff's, which in equity and conscience he has no right to retain; and this, whether there be or not any contract or privity between the parties. *Kreutz* v. *Livingston*, 15 Cal. 347.

8. Defendants were the holders of a mortgage, executed by the Yreka Water Co. and B. to them, to secure advances made and to be made, by themselves and others, to said company. Plaintiff had made advances to the company, and was one of the persons intended to be secured by the mortgage, though not a party thereto. Defendants assign the mortgage, receive the consideration therefor, but refuse to pay any portion of the money to plaintiff, who sues for money had and received to his use: held, that the action lies; that defendants are in possession of money which in equity and conscience they are bound to pay over. *Ib.*

9. Held, further, that defendants occupied toward plaintiff the position of trustees, and that the money sued for was received in that character; that it is of no consequence that the trust was created by a contract to which plaintiff was not a party, as he subsequently assented to it, and defendants cannot now repudiate it and retain money which they would not otherwise have received. *Ib.*

10. Taxes not properly due and paid under protest may be recovered back by suit against the tax collector. *Falkner* v. *Hunt*, 1 Cal. 170.

11. In this case, the city having discharged the street assessments by receiving in payment thereof outstanding warrants, she is primarily liable to plaintiff as for moneys received to his use, even on the theory that she acted simply as the agent of the plaintiff in collecting the assessments. *Argenti* v. *City of San Francisco*, 16 Cal. 282.

12. The city would not be liable independent of the contract made by her acceptance of the proposals of the contractor. A municipal corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements of a local nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability, as upon implied contracts, has no ap-

plication to cases of this character. *Ib.*

13. That doctrine applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes upon the city the obligation to do justice with respect to the same. *Ib.*

14. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner from the like general obligation. *Ib.*

15. In these cases, the city does not make any promise, but the law implies one, and it is no answer to a claim resting upon such implied contract, to say no ordinance has been passed, or that the liability of the city is void when it exceeds the limitation of $50,000 prescribed by the charter. *Ib.*

16. To fix the liability of the city in respect to money or other property, the money must have gone into her treasury or been appropriated by her, and the property must have been used by her or be under her control. *Ib.* 283.

17. In case of services rendered, the acceptance of the services must be evidenced by ordinance to that effect. Their acceptance by the city, and the consequent obligation to pay them, cannot be asserted in any other way. If not originally authorized, no liability can attach upon any ground of implied contract. *Ib.*

18. The improvements in this case—being to particular streets—were local in their character, and though to some extent of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood. The advantages resulting from them do not constitute that kind of general advantage to the city from the existence of which any liability to pay for the same can be inferred. The general doctrine, that when one takes a benefit which is the result of another's labor he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediate to the adjacent property holders, and only indirectly to the city at large. *Ib.*

19. As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities for the use of money, or other property which does not belong to her, and to liabilities springing from neglect of duties imposed by her charter, from which parties are enjoined. *Ib.*

20. Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter—as for instance, upon the issuance of bills of credit. *Ib.* 284.

MORTGAGE.

I. In general.

1. A party having knowledge of the existence of a prior mortgage who then takes a second mortgage on the premises, has no right to complain that it was not recorded. *Woodworth* v. *Guzman*, 1 Cal. 205.

2. There was no officer in San Francisco who, according to the Mexican law, was authorized to record mortgages, and, unless there was, a mortgagee was not bound by the rule of notice to subsequent incumbrances. *Ib.*

3. Where statutes are in force requiring mortgages to be recorded, if a subsequent mortgagee has notice of a prior unrecorded mortgage, he takes his lien subsequent to that of the first mortgage. *Ib.*

4. Equity will, as against a mortgagor, correct a mistake in the description of the mortgaged premises as a matter of course,

and a person claiming under the mortgagor, and having notice of a prior lien upon the premises, is in no better condition than the mortgagor himself. *Ib.*

5. The particular form of words is necessary to constitute a mortgage more than any other contract. *Woodworth* v. *Guzman*, 1 Cal. 205; *De Leon* v. *Higuera*, 15 Cal. 496.

6. Where a power of sale is contained in a mortgage, and under a sale by virtue of such power the mortgagor becomes the purchaser, the equity of redemption still attaches to the property in favor of the mortgagor and he may redeem. *Benham* v. *Rowe*, 2 Cal. 407.

7. Where the complaint does not charge the mortgagee with negligence and improper conduct in leasing the mortgaged premises, the court cannot charge the jury thereupon, though evidence may have been admitted on that point. *Ib.*

8. Where a sale was irregularly made under a power contained in a mortgage, and the bill filed by the mortgagor did not ask to have it set aside, the sale must stand. *Ib.* 408.

9. But where such sale was not made in cash, but for currency of less value, the mortgagor is clearly chargeable with the highest market value of the lot sold, to be credited to the account of the mortgagor. *Ib.*

10. If the mortgagor acts in bad faith towards the owner, or is guilty of gross negligence, such as will greatly injure the owner, he is liable to such damages as a jury may assess. *Ib.*

11. When a mortgagee takes possession of the mortgaged premises, his care and trouble are bestowed for the furtherance and protection of his own interests, and he can ask no compensation for his services. *Ib.*

12. A stipulation that a party should be protected for his advance of money to be expended in building upon a mortgaged lot, by the mortgagee, is a promise to repay the money so expended out of the mortgaged premises, and is binding on the assignee of the mortgage with notice. *Godeffroy* v. *Caldwell*, 2 Cal. 492.

13. Mortgages at the present day are considered as mere securities for the payment of money, and no breach of their conditions can possibly vest the title in the mortgagee. *Ib.*

14. A mortgage made prior to the passage of the act concerning conveyances, was not recorded in accordance with the provisions of the forty-first section of the said act: held, that it lost its priority as against a subsequent purchaser, without notice. *Call* v. *Hastings*, 3 Cal. 184.

15. The purchaser of a mortgage is subrogated to the rights of a mortgagee. *Johnston* v. *Dopkins*, 3 Cal. 395.

16. If the mortgagor stood by and saw the mortgagee sell the property in fee without interposing, and a knowledge of this could be brought home to the mortgagor's subvendees, he, and those claiming under him, would be estopped from asserting title. *Ferguson* v. *Miller*, 4 Cal. 102.

17. A conveyance of real estate conditioned to be void on the payment of a given sum of money on a given day, otherwise to remain in full force and virtue, is a mortgage, and not a conditional sale. *Ib.*

18. It is necessary to record a mortgage to give notice only to "subsequent purchasers or mortgagees without notice"; no mention is made of liens, hence it follows that a mechanic's lien will not precede an unrecorded mortgage of prior date.* *Rose* v. *Munie*, 4 Cal. 173.

19. A defendant in a foreclosure suit cannot object that his wife also joined in the execution of the mortgage, but is not made a codefendant. *Powell* v. *Ross*, 4 Cal. 198.

20. In an action of ejectment, brought by a purchaser at Sheriff's sale under a decree of foreclosure, and sale of mortgaged premises, to recover the same against the mortgagor in possession, the mortgagor is estopped from setting up title in another as a defense to the action. *Redman* v. *Bellamy*, 4 Cal. 250.

21. Where a party, to enforce a claim for the balance of the purchase money paid, instead of resorting to his lien in equity, commenced an action at law, for the recovery of money, and sold the land on execution subject to a mortgage, the purchaser to enforce the subrogation to any equitable lien, must file his bill to that effect, but cannot set up his right in an action to enjoin the mortgagee from foreclosing his mortgage thereupon. *Allen* v. *Phelps*, 4 Cal. 259.

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*The Act of 1855, p. 156, provided that mortgages must be recorded to have precedence over liens.

22. An action will not lie on the mere recital in a mortgage of the existence of a debt. *Shafer* v. *Bear River and Auburn W. & M. Co.*, 4 Cal. 295.

23. A conveyed land to B, and allowed part of the purchase money to remain unpaid; B afterwards sold part of the land to C, who had no notice of A's lien as vendor, and gave a mortgage to B for part of the purchase money. A obtained a judgment against B for the unpaid purchase money, and levied upon and sold B's interest in the land: it was held that the purchaser at sheriff's sale did not acquire title to the mortgage debt due from C to D. *Bryan* v. *Sharp*, 4 Cal. 349.

24. Plaintiff purchased at sheriff's sale under foreclosure of a mortgage, property for twenty dollars, worth three thousand dollars, with a rental of fifty dollars per month. The defendant purchased the property under another mortgage for two thousand dollars, and the plaintiff being in possession, filed his bill to cancel the defendant's deed and remove the cloud from his title: held, that to entitle the party to this relief, it must appear that his purchase was fair, just and reasonable, and founded upon an adequate consideration, as a court of equity will not use its powers to complete a speculation which is already too fortunate to obtain its favorable regard. *Dunlap* v. *Kelsey*, 5 Cal. 181.

25. A mortgage upon record operates as constructive notice to all parties, and the purchaser thereof cannot be charged with constructive notice of anything subsequent to the mortgage except its assignment or satisfaction duly entered of record. *Peters* v. *Jamestown Bridge Co.*, 5 Cal. 336.

26. Treating a mortgage as a mere security for the purchase money, it is evident that the debt could not be lost by the acceptance of a new mortgage intended to supply the old one and secure the same debt. *Dillon* v. *Byrne*, 5 Cal. 457.

27. Where land is chargeable for the purchase money, that charge could not be evaded by the execution of any new mortgage designed to secure the debt. *Ib.*

28. A married woman has no power to execute a mortgage to secure the payment of a promissory note given by her as a femme covert. *Simpers* v. *Sloan*, 5 Cal. 458.

29. Where a mortgage is executed simultaneously with a conveyance of the land, it is considered in law as one act, and no prior lien on the general property can be prior to the mortgage. *Guy* v. *Carriere*, 5 Cal. 512.

30. The entering a discharge of the mortgage by the mortgagee does not of itself discharge the debt, but only the security. *Sherwood* v. *Dunbar*, 6 Cal. 54; *Shaver* v. *Bear River and Auburn W. & M. Co.*, 10 Cal. 402.

31. In an action of foreclosure, where the complainant has a copy of the mortgage annexed to which it refers: held, that a correct description of the land in the mortgage is sufficient for the purposes of the suit. *Emeric* v. *Tams*, 6 Cal. 156.

32. Mortgages and liens of record form no exception to the rule prescribed by section one hundred and thirty-six of the act to regulate the estates of deceased persons; and the claims secured by them must have been presented to the executor or administrator, and rejected by him, before an action can be maintained on them. *Ellisen* v. *Halleck*, 6 Cal. 393; *Falkner* v. *Folsom*, 6 Cal. 412; *Hentsch* v. *Porter*, 10 Cal. 560.

33. A mortgagee in possession has a legal title against the whole world, subject to the rights of the mortgagor; therefore, when he mortgaged the property and subsequently erected a building on it, for the cost of which a mechanic's lien was filed, the holder of the lien cannot object to the legality of the mortgage in the face of which he contracted. *Ferguson* v. *Miller*, 6 Cal. 404.

34. A mortgage debt due by the estate of a deceased person stands in the same position as any other debt, and its allowance by the executor and probate judge gives to the claim all the virtues and properties which a judgment against executors can have under our system. *Falkner* v. *Folsom*, 6 Cal. 412.

35. The sale of the equity of redemption of mortgaged premises, and the assignment of the rents thereof until foreclosure and sale to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured and may be enforced by foreclosure. *Dewey* v. *Latson*, 6 Cal. 616.

36. Where the plaintiff filed his bill to foreclose a mortgage executed by defendants, who admit the demand but ask that

a certain sum be retained in the hands of the court to answer a judgment against defendants, to the satisfaction of which they claim that the plaintiff is proportionately liable as a former partner of defendants, although he was not served with process in the case: held, that it was error to retain such sum in the hands of the court. *Bell* v. *Walsh*, 7 Cal. 87.

37. Where the owner of a lot contracted for the erection of a house thereon, and agreed to pay certain sums of money as the work progressed, and on its completion to convey a certain other lot, for which purpose R. releases the mortgage on the lot; and during the work the owner of the lot on which the building was being erected mortgaged it to R., and subsequently on its completion, by agreement with the builders, gave his note for $10,000 instead of the lot he was to convey, and the builders filed a notice of lien, and assigned note and lien to plaintiff: held, that so much of the claim as represented the value of the lot which was to have been conveyed must be postponed to the mortgage. *Soule* v. *Dawes*, 7 Cal. 576.

38. A deed and mortgage being simultaneous, are but parts of the same transaction. *Lassen* v. *Vance*, 8 Cal. 275.

39. He who takes a second conveyance or mortgage with actual notice of the first, deliberately aids and abets the fraudulent grantor or mortgagor, in the attempted commission of a fraud, and should justly suffer the consequences. *Mitchell* v. *Steelman*, 8 Cal. 376.

40. Where A mortgaged a lot of land for five hundred dollars, and afterwards conveyed the same to B, a femme sole, in trust for her children, and A then married B, and the two together then borrowed an additional sum, and executed a joint mortgage for the whole amount to the assignee of the first mortgage, and the note of the first debt was surrendered, though the mortgage was not canceled, and the debt was again increased, and the last mortgage canceled, and a new one for the increased amount executed by A and B: held, that the holder of the last note and mortgage was entitled to a judgment thereon, and to a decree of foreclosure and sale for the amount of the first note and mortgage. *Birrell* v. *Schie*, 9 Cal. 107.

41. Possession by the mortgagee cannot abridge, enlarge, or otherwise affect his interest, nor convert that which was previously a security into a seizin of the freehold. *Nagle* v. *Macy*, 9 Cal. 429.

42. A mortgagee who is also a trustee is as strictly bound to fulfill his trust faithfully as he would be were he not a creditor, but acting for the benefit of another cestui que trust. *Gunter* v. *Janes*, 9 Cal. 658.

43. A mortgage is a security for a debt, and of course the relation of creditor and debtor must exist between its different parties. *Hickox* v. *Lowe*, 10 Cal. 206.

44. If a debt continued after the execution of the conveyance, the instrument is a mortgage; if on the other hand the debt was extinguished by the conveyance, the agreement to reconvey must be regarded as an independent contract, in no respect affecting the absolute character of the original instrument. *Ib.* 207.

45. Where there is doubt on this point, courts of equity lean in favor of the right of redemption, and construe instruments as constituting a mortgage, rather than a conditional sale. *Ib.* 207.

46. It is not necessary to constitute a mortgage, that it should appear upon the face of the papers that there was any personal obligation on the part of the mortgagor to pay the amount of the principal and interest. Such obligation would only enable the mortgagee to look to the mortgagor for any deficiency remaining after the application of the proceeds of sale of the premises to the payment of the sum secured. *Ib.* 200.

47. A conveyance, and an attendant agreement for a reconveyance upon the payment of the amount of the consideration and interest, do not of themselves in the absence of other circumstances create a mortgage, but only a defeasible purchase, which should be narrowly watched, but it may be made the means of converting what was in fact intended as security into an absolute purchase. *Ib.*

48. Slight circumstances will determine the transaction to be one of mortgage when that can be done without violence to the understanding of the parties. *Ib.*

49. Where a mortgaged debt has been lost by the negligence of the notary, the measure of damages is the amount of the debt and interest to be secured by the mortgage. *Fogarty* v. *Finlay*, 10 Cal. 246.

50. Where a debtor who was at the

time insolvent, executed a mortgage of all his property and effects to certain specified creditors, to secure his indebtedness to them and to protect them from liabilities incurred by their endorsement of his paper: held, that the mortgage was not an assignment either within the letter or spirit of the insolvent act, and did not create a trust for the use of the mortgagor, prohibited by the statute of frauds. *Dana* v. *Standfords*, 10 Cal. 277.

51. A note and mortgage executed by thirteen partners in a joint enterprise to three of them, is equivalent to a note and mortgage executed by the whole to the three for an amount less by the proportion of the number of three to the whole; that is, to three-thirteenths of the sum therein mentioned, and may be enforced in equity in like manner as if so executed. *McDowell* v. *Jacobs*, 10 Cal. 389.

52. Though a mortgage in contravention of law is void, it is not perceived that this fact invalidates the debt it was intended to secure. *Shaver* v. *Bear River and Auburn W. & M. Co.*, 10 Cal. 402.

53. Where the vendee's agent, in the purchase of a tract of land, has actual notice of a mortgage on the premises at the time of purchase, the vendee will be presumed to have taken the property subject to the mortgage. *May* v. *Borel*, 12 Cal. 91.

54. No presumption arises of a gift or advancement to the wife from the fact that a note and mortgage were taken in the name of both. *Meyer* v. *Kinzer*, 12 Cal. 255.

55. A party in possession of public land, claiming title to it, must be presumed to be the owner of it, and can mortgage it. When another party enters under, and in privity with the title of the mortgagor, he will not be allowed to defeat the mortgage upon the ground that the same was not executed in pursuance of the statute concerning chattel mortgages. *Houseman* v. *Chase*, 12 Cal. 291.

56. A vendor's lien does not exist in this State where a mortgage security is taken for the purchase money. *Hunt* v. *Waterman*, 12 Cal. 305.

57. The fact that such mortgage is defective, does not revive the lien, as it is the intention of the vendor which controls. *Ib.*

58. The fact that two or more persons join in the execution of a mortgage of lands, does not raise a presumption that the estate mortgaged is joint property, and a judgment cannot be entered against all when only one is served. *Bowen* v. *May*, 12 Cal. 351.

59. A mortgage on public land, or the improvements thereon, is not void because it does not follow the provisions of the chattel mortgage act. That act gives a new remedy, but does not take away the old. *Haffley* v. *Maier*, 13 Cal. 14.

60. The mortgagor having mortgaged the land as his own property is estopped, as are his privies in estate, from saying it is public land. *Ib.*

61. In suit on a note and mortgage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the intervenors cannot prevent a judgment for plaintiff against defendant. The most they can claim is protection against the enforcement of the judgment to their prejudice. *Horn* v. *Volcano Water Co.*, 13 Cal. 69.

62. Subsequent creditors cannot complain that the note and mortgage of a common debtor were executed without consideration. *Ib.* 71.

63. A mortgagee of land in possession must account for rents and profits; and after payment of the debt for which the mortgage was given, he becomes by operation of law trustee of the surplus for the mortgagor. *Pierce* v. *Robinson*, 13 Cal. 120.

64. Parol evidence is admissible in equity to show that a deed absolute upon its face was intended as a mortgage, and that the restriction of the evidence to cases of fraud, accident or mistake in the creation of the instrument, is unsound in principle and unsupported by authority. *Pierce* v. *Robinson*, 13 Cal. 125; overruling *Lee* v. *Evans*, 8 Cal. 434, and *Low* v. *Henry*, 9 Cal. 548.

65. The Uncle Sam Mining Company execute a mortgage upon their mining claims to R., a director of the company. The mortgage was in fact in trust to secure F., who had as security for R. signed with him a joint and several note to D., for money loaned by him to R. The money was for the company. R. assigns this mortgage to F. to secure him against his liability on the note, delivering the mortgage at the same time to F. who

retained it a few minutes and returned it to R. to receive the interest from the company, as agent for him, F. The note is unpaid; R. owes the company nothing: held, that after the assignment, B. had no interest in the mortgage which a judgment creditor could reach; that the delivery of the mortgage to R. for the purpose of collecting interest, there being no circumstances of fraud or suspicion, did not impair the rights of the assignee; that the liability of F., as surety, was a sufficient consideration for the assignment, and that such an assignment is not a mortgage of a mortgage. *Hall* v. *Redding*, 13 Cal. 219.

66. Mere indefiniteness of the description in the mortgage is no objection to the enforcement of the mortgage as it is written, whatever the effect of the sale under such a description would be. *Tryon* v. *Sutton*, 13 Cal. 491; *Whitney* v. *Buckman*, 13 Cal. 538.

67. Where a mortgagee released a mortgage made by two parties, and took a new mortgage made by one to whom the other had meanwhile sold, the new mortgage being for a less sum by five hundred dollars, paid at the time, and bearing a different rate of interest, it will require clear evidence of fraud to induce a court of equity to interfere, and give the mortgage priority over intervening liens. *Dingman* v. *Randall*, 13 Cal. 513.

68. If a mortgage under seal expressly declares and recites an indebtedness, that is sufficient evidence of the indebtedness in a foreclosure suit. No law requires any note, bond or the like, in addition to such a mortgage. *Whitney* v. *Buckman*, 13 Cal. 539.

69. The right to a preëmption in public land is not assignable, but may be mortgaged; and if the mortgagee gets no title through the mortgage, this is not an objection to be raised by the man who makes it. *Ib.*

70. Where husband and wife execute a note and mortgage, the note is good as to the husband, even if void as to the wife; and the property is bound by the mortgage, independent of the note of the wife. *Pfeiffer* v. *Rhein*, 13 Cal. 649.

71. At common law, a bond for title is in effect a mortgage. The legal title remains in the vendor, and an equity vests in the vendee to have the title on compliance with the conditions. The legal title, as also the equity, goes to the whole estate, and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclose. *Merritt* v. *Judd*, 14 Cal. 73.

72. In a suit to enforce a mechanic's lien on a ditch, a mortgagor of the ditch subsequent to the lien has no absolute right of intervention. And where the suit had been pending some time, and the application to intervene was made just as plaintiff was taking judgment, the application was properly refused. *Hocker* v. *Kelley*, 14 Cal. 165.

73. For extra work on a building by the contractor, in pursuance of a general provision in the contract for extra work, at the will of the owner, there may be a lien on the property, as against a mortgage, given by the owner before the extra work was commenced, provided the work was done with the knowledge of the mortgagee and without objection from him. *Soule* v. *Dawes*, 14 Cal. 250.

74. A deed of trust, the trustee not being the creditor, but a third party, given to secure a note, and authorizing the trustee to sell the land at public auction, and execute to the purchaser a good and sufficient deed of the same, upon default in paying the note or interest as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, is not a mortgage requiring a judicial foreclosure and sale. *Koch* v. *Briggs*, 14 Cal. 262.

75. In mortgages there exists the right to foreclose, after condition broken, and the right of redemption from forfeiture. These two rights are mutual and reciprocal. Where one cannot be enforced, the existence of the other is denied; and when either is wanting, the instrument, whatever its resemblance in other respects, is not a mortgage. *Ib.* 263.

76. In mortgages, the form of the contract is one of conveyance, while in truth the contract is only one of security, and equity gives effect to the intention of the parties. *Ib.*

77. A tender of the money due on a bond and mortgage, after the law day of the mortgage, and a refusal to accept the money, do not discharge the lien of the mortgage. *Perre* v. *Castro*, 14 Cal. 528.

78. In considering the operation of a mortgage upon subsequently acquired

title, it is immaterial whether it be regarded as a conveyance of a conditional estate, as at common law, or as creating a new lien or incumbrance, as by the law of this State. *Clark* v. *Baker*, 14 Cal. 632; *Clark* v. *Boyreau*, 14 Cal. 636.

79. In this State, a mortgagee of a term in possession is not liable as assignee upon the covenants of the lease. *Johnson* v. *Sherman*, 15 Cal. 292.

80. A mortgage is a mere security, and does not vest in the mortgagee any estate in the land, either before or after condition broken. Payment after default operates to discharge the lien equally with payment at the maturity of the debt. *Ib.* 293.

81. Nor does possession under the mortgage affect the nature of the mortgagee's interest; it does not change the relation of debtor and creditor, or impair the estate of the mortgagor, but leaves the rights and interests of the parties exactly as they existed previously. *Ib.*

82. Possession taken by the consent of the owner, or by contract with him, may confer rights as against third parties, but they are independent and distinct from any rights springing from the mortgage, from which they derive no support. *Ib.*

83. The law of England and New York upon these points stated. Parol evidence is admissible to show that a conveyance or assignment, absolute on its face, was intended as a mortgage. *Ib.* 291.

84. A tract of land was held by several tenants in common, and on partition, a certain portion was set apart and quit-claimed to plaintiff, representing M., who had conveyed to plaintiff as security for endorsements. Another portion of the land was set apart and quit-claimed to H. The portion thus received by H. was subsequently conveyed to plaintiff, and embraces the land in controversy: held, that plaintiff is not mortgagee of the premises; and even if he held the premises conveyed by H. to him as security for the endorsement of M., it was as trustee of the legal title; that the title had passed from H., and had never been in M., except of an undivided interest before the partition, and was, therefore, in plaintiff, who could maintain ejectment. *Seaward* v. *Malotte*, 15 Cal. 307.

85. Defendants were the holders of a mortgage, executed by the Yreka Water Co. and B. to them, to secure advances made, and to be made, by themselves and others, to said company. Plaintiff had made advances to the company, and was one of the persons intended to be secured by the mortgage, though not a party thereto. Defendants assign the mortgage, receive the consideration therefor, but refuse to pay any portion of the money to plaintiff, who sues for money had and received to his use: held, that the action lies; that defendants are in possession of money which in equity and conscience they are bound to pay over. *Kreutz* v. *Livingston*, 15 Cal. 347.

86. Held, further, that defendants occupied toward plaintiff the position of trustees, and that the money sued for was received in that character; that it is of no consequence that the trust was created by a contract to which plaintiff was not a party, as he subsequently assented to it, and defendants cannot now repudiate it, and retain money which they would not otherwise have received. *Ib.*

87. Bill avers, in substance, plaintiff to be holder of several notes and mortgages executed to him by defendants, H. and wife, and that the defendant, O'D., proposed to plaintiff to buy said notes and mortgages for a certain sum, which plaintiff agreed to take; that O'D. desired, before closing the purchase, to see H. and wife, and learn whether they could be induced or compelled to pay the notes; asked the plaintiff for the notes and mortgages to show H. and wife, and that plaintiff delivered them to him, relying on his honesty; that O'D. saw H. and wife, who were illiterate, and by representing himself as the owner of the notes, etc., which he exhibited, by threatening to sue, etc., induced H. and wife to give him an absolute deed in fee simple of the mortgaged premises for one hundred dollars, the premises being worth many more thousands of dollars; that O'D. then returned the notes, etc., declined purchasing of plaintiff, and concealed the fact of having a deed from H. and wife; that all this was a fraud on plaintiff; that O'D., in taking said deed, acted as agent and trustee of plaintiff, and for his benefit, and should have taken the deed in his name; that in equity said O'D. ought to be declared such trustee, and execute a deed of the property to plaintiff; that on account of a

defect in the record of one of the mortgages, it does not impart notice, etc., and that if O'D. should sell the property, as he is trying to do, to an innocent purchaser, such sale would injure plaintiff irreparably. Other parties are made defendants, as claiming some interest subsequent to plaintiff. Complaint prays for injunction against O'D., that said trust be declared, that he execute a deed to plaintiff, that H.'s wife execute to plaintiff such further conveyance and assurance and release of equity of redemption as may be just in satisfaction of said mortgages, and that all defendants be barred, foreclosed, etc.; or that the deed by H. and wife to O'D. be declared void and canceled, and he be foreclosed of all equity of redemption thereunder; and if such deed be canceled, that then the plaintiff have judgment against H. and wife on said notes, that all the defendants be barred, etc., and premises sold to pay the judgment, etc. O'D. demurs that inconsistent causes of action are united: held, that the demurrer is not well taken, that the allegations of the complaint make out a homogeneous case as against all the defendants, to wit: a right to enforce the mortgages, and to a decree of foreclosure binding subsequent claimants, of whom O'D., by his purchase, is one, with notice of the mortgages. *DeLeon* v. *Higuera*, 15 Cal. 495.

88. Held, further, that O'D. cannot set up either the invalidity of the mortgages given by H. and wife—who release errors—or the title acquired by him from them, and that he holds property in trust for plaintiff. *Ib.* 495.

89. The notes and mortgages in this case were properly admitted in evidence, against the objections of O'D., as showing the history of the transaction, and his connection with the property, as also the consideration of the last mortgage, which was given as security for money then loaned, and for the money previously loaned, and secured by three previous mortgages on the same land. *Ib.* 496.

90. A subsequent purchaser of property mortgaged, with actual notice of the mortgage, cannot object to defects in the registry thereof. *Ib.* 496.

91. A mortgage describing the land as "the rancho of her property, in the place known by the names of 'Laguna de los Palos Colorados,' or 'Santa Clara,' in Contra Costa county," and stating the land to be the half league the mortgagor acquired from the grant to her first husband, Juan Bernal, which grant is before the United States commission for confirmation, is not void for uncertainty in description. *Ib.*

92. No particular words are necessary to create a mortgage. The words, "we mortgage the property," when accompanied by a provision for the sale of it in case the money, recited in the instrument as being thus secured, be not paid, are clearly sufficient. *Ib.*

93. The property of the wife may be mortgaged by joint deed of herself and husband for the debt of the husband. *Ib.*

94. Query: whether in a foreclosure suit in the seventh district as to land situate in Contra Costa county, a party can appear and contest the case in San Francisco, before the judge of the seventh district, under a stipulation, and without exception as to the place of trial, and afterwards assign that fact as error. *Ib.* 495.

95. R. & Co., defendants, had two mechanics' liens upon certain property, one filed October, 30th, 1854, the other filed December 8th, 1854, against defendant, V. In 1855, R. & Co. sign an entry on the record of liens, stating that the liens did not fall due till January 15th, 1856. This was done on the supposition that the act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16th, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and received a sheriff's deed. Plaintiff, as mortgagee of the property subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co's judgment and sale on the ground of fraud: held, that R. & Co. and V. had a right to rescind the arrangement made to extend the lien, such extension having been made under misapprehension, the debt being legal and just, and plaintiff having acquired no rights which it would be inequitable to disturb; that such rescission is no evidence of fraud. *Gamble* v. *Voll*, 15 Cal. 510.

96. The fact that judgment on the liens in this case included a charge of interest at two per cent. given on a prior extension of the lien, which interest is over and

above the original contract price for the articles for which the lien was claimed, is not of itself conclusive proof of fraud in the judgment, but such interest cannot be charged on the premises as against plaintiff. *Ib.*

97. As subsequent mortgagee, plaintiff would have a right, in a proper case, to redeem the premises from the sale under the judgment on the liens, by paying the money justly due, interest, costs, etc., he not having been party to the suit by the lien holder. *Ib.*

98. Where a mortgage is given to secure a debt, it is not of the essence of the deed whether the debt be evidenced by one form of contract or another. All that a court of equity desires to know is, what is the debt really intended to be secured. *Blankman* v. *Vallejo*, 15 Cal. 644.

99. In a foreclosure suit on bond and mortgage, the fact that the bond offered in proof on the trial does not answer the description of the bond as recited in the mortgage, is matter of identity merely, and not properly matter of variance—the bond offered answering to the description given in the complaint. *Ib.*

100. In this case, as the bond in the complaint answers to the description of the bond offered in evidence, and as the complaint avers that the mortgage was given to secure this bond—the denials in the answer being literal and conjunctive—the execution of the bond and mortgage was held to be admitted by the answer, as also that the mortgage was given to secure the debt evidenced by the bond. *Ib.*

101. Although an answer denies the delivery of a bond and mortgage, still their possession by plaintiff is evidence of delivery. *Ib.*

102. A mortgage is not personal property within the revenue act of 1856, nor liable, as such, to taxation. *Falkner* v. *Hunt*, 16 Cal. 171.

103. An assessment thus: "Mortgages (Marysville) $100,000," is insufficient under the act. The assessment does not show for what the mortgages were given, nor on what property, nor whether the debts were solvent, nor the value of the property mortgaged; and the sole fact that the mortgage was held for a given amount does not make the mortgage subject to taxation as for so much money. *Ib.* 172.

104. Land mortgaged may be taxed without reference to the mortgage, and if the mortgage be to secure a debt, the debt may be taxed; if to secure a loan of money, the money may be taxed; but the act does not intend to tax the mortgage, as such, and also to tax the money loaned and secured by the mortgage, or the solvent debt it represents. *Ib.* 171.

105. An assessment thus: "Personal property—mortgages (Marysville) $100,000," is not good as an assessment of personal property, independent of the term "mortgages," on the ground that the act requires no description of personal property to be given, but its value only. The whole statement must be taken together, and that shows "mortgages" to be taxed, and they are not subject to taxation as such. *Ib.* 172.

106. Prima facie, a mortgage is no more taxable than a deed or any other muniment of title or mere security, and the money which it secures cannot be taxed without a more particular description than the general designation, "personal property." *Ib.*

107. Under this act, a lumping assessment of "personal property" is bad. Every item of taxable property need not be listed, but the different classes named in the act should be stated—as goods, money loaned, gold dust, solvent debts, etc. *Ib.*

108. A mere stranger, who voluntarily pays money, due on a mortgage, and fails to take an assignment thereof, but allows it to be canceled and discharged, cannot afterwards come into equity, and in the absence of fraud, accident or mistake of fact, have the mortgage reinstated, and himself substituted in the place of the mortgagee. Cases cited as to whether and when payment of money due on a mortgage operates as a discharge or as an assignment of the mortgage. *Guy* v. *Du Uprey*, 16 Cal. 198.

109. The wife cannot mortgage her separate real estate unless her husband unite in the conveyance in the mode prescribed by our statute—at least, as to property acquired after the passage of the statutes; and these statutes, when operating in futuro, are constitutional. *Harrison* v. *Brown*, 16 Cal. 290.

110. The act of February 14th, 1855, makes an exception in case the husband

be not, and for one year next preceding the execution of the conveyance of the wife has not been, bona fide residing in State. *Ib.*

111. But the fact that the husband abandons his wife, or suffers her to act as a femme sole, and take care of herself, does not give her a right to mortgage either his or her separate property—whatever may be the effect of such acts of the husband in rendering her personally liable for her contracts. *Ib.* 291.

112. A mortgagee in possession of personal property has such a title that a felonious taking of the property by the mortgagor would be larceny. *People* v. *Stone*, 16 Cal. 371.

113. At common law a mortgage was regarded as a conveyance of a conditional estate, and upon breach of its condition the estate became absolute; but courts of equity, to relieve from the hardships of this rule, gave to the mortgagor a right to redeem upon payment, within a reasonable time, of the debt secured. *Goodenow* v. *Ewer*, 16 Cal. 466.

114. In this State, a mortgage is not regarded as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken, but is regarded as a mere security, operating upon the property as a lien or incumbrance only. *Ib.* 467.

II. Foreclosure.

115. The defendant bought of plaintiff land, and gave a mortgage to secure the payment of the purchase money, and on the foreclosure pleaded a want of consideration: it was held, he was estopped in his defense by the terms of the mortgage. *Tartar* v. *Hall*, 3 Cal. 266.

116. If the plaintiff claims under a conveyance shown to be a mortgage, it is not new matter for the defendant to show by the same witness that the mortgage had been satisfied. *Chenery* v. *Palmer*, 5 Cal. 132.

117. The usual and best method of proceeding in cases of foreclosure is to appoint a master, to find and report an amount due, and then exceptions may be filed to the report upon which the judgment of the chancellor is given, and this may afterwards be assigned as error. *Guy* v. *Middleton*, 5 Cal. 417.

118. It is no error for the chancellor to make the calculations himself; but when he has done so, a mistake in calculation must be brought to his notice in some form analogous to that of an exception to a master's report. *Ib.*

119. Actions for the foreclosure of mortgages must be tried in the county in which the subject of the action or some part thereof is situated. *Vallejo* v. *Randall*, 5 Cal. 462; contra *Watts* v. *White*, 13 Cal. 324.

120. He who has the right to the note has undoubtedly the right to foreclose the mortgage, though not made to himself. *Ord* v. *McKee*, 5 Cal. 516.

121. A copy of a mortgage is not admissible in evidence when the absence of of the original is not accounted for. *Ib.*

122. Where a new note on the same terms between the same parties for the same sum and of the same date, is given as a substitute for a previous note secured by mortgage, the owner is entitled to a foreclosure on the new note. *Spring* v. *Hill*, 6 Cal. 18.

123. In a suit to foreclose a mortgage it is competent for the defendants to introduce in evidence a subsequent written agreement of the parties, by which an assignment of the rents of the mortgaged premises, until full payment of the mortgage debt is made by the mortgagor and accepted by the mortgagee. *Angier* v. *Masterson*, 6 Cal. 62.

124. In a foreclosure suit the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed pending the litigation. *Guy* v. *Ide*, 6 Cal. 101.

125. Where the plaintiff being the owner of an undivided one-half of a tract of land, mortgaged his interest therein to A, and subsequently with his cotenant conveyed the land to B and C, two-thirds to one and one-third to the other, by two separate deeds, in each of which is set forth the agreement of the grantees to assume the payment of the mortgage; and after the mortgage fell due the plaintiff filed his bill against B and C, to compel a foreclosure and payment: held, that the case was one of chancery jurisdiction, and that it was not necessary for plaintiff first to pay the mortgage before bringing his action. *Abell* v. *Coons*, 7 Cal. 109.

126. Where a judgment is rendered against A and his sureties, and A and a portion of his sureties, in order to secure a portion of said judgment, mortgage their property, subsequent to which an execution under the judgment is levied upon sufficient property of B, a surety not joining in the mortgage, to satisfy the judgment, and is afterwards voluntarily released: held, that no action can be maintained on the mortgage, for the levy satisfying the judgment, the mortgage as an incident thereto must also be thereby satisfied. *People* v. *Chisholm*, 8 Cal. 30.

127. Where the party brought separate action, first at law on the notes, and then in equity for a foreclosure, before the adoption of the rule consolidating these actions: held, that he be allowed both his legal and equitable remedies, on payment of the costs of the latter suit. *Walker* v. *Sedgwick*, 8 Cal. 403.

128. A suit for the foreclosure of a mortgage is peculiarly an equity proceeding, and when a district court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief, and for this purpose to decree and execute a sale of the mortgaged premises. *Belloc* v. *Rogers*, 9 Cal. 129.

129. At common law a mortgage vested the legal title in the mortgagee, subject to be defeated by the performance of the condition subsequent, but this theory is entirely changed by our system, and the legal title is with the mortgagor subject to be divested by a foreclosure and sale. *Belloc* v. *Rogers*, 9 Cal. 125; *McMillan* v. *Richards*, 9 Cal. 411; *Nagle* v. *Macy*, 9 Cal. 428.

130. A executed a note and mortgage to B; subsequently A and B entered into partnership in the livery business; A was to furnish the stable, hay and grain, and board B; and B was to attend to the stable; the profits to be equally divided, and the share of A was to be applied in discharge of the note. B received the sum of three hundred and ninety-six dollars as share of the profits of the business, and then after maturity assigned the note and mortgage to C. C brought suit against A for the whole amount; A plead payment and set-off: held, that A was entitled to the credit of the payment. *Mount* v. *Chapman*, 9 Cal. 296.

131. The owner of the mortgage in this State, can in no case become the owner of the mortgaged premises except by purchase upon sale under judicial decree consummated by conveyance. *McMillan* v. *Richards*, 9 Cal. 411.

132. A mortgagor after the sale of the mortgaged premises under a decree in a suit to foreclose the mortgage, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed, but he possesses no right to despoil the property in its fixtures. The deed of the sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor. *Santis* v. *Pfeiffer*, 10 Cal. 265.

133. In an action of foreclosure of a mortgage brought by the administrator upon a note and mortgage given to the intestate in his lifetime, a witness, whose wife is a sister and heir of the deceased, is incompetent upon the grounnd of interest. *Lisman* v. *Early*, 12 Cal. 283.

134. S. and B., in 1854, execute a mortgage on their property to H. Subsequently they execute another mortgage on the same property to plaintiff. Later, in 1855, S. conveys his interest to V., the deed declaring the interest to be sold subject to the two mortgages. Later, V. sells to defendant W., the deed containing the same recital as the last. In February, 1856, a decree of foreclosure of the first mortgage to H., sale of the property thereunder, defendant W. the purchaser, and in due time a sheriff's deed to him, and possession. In June, 1856, foreclosure of the second mortgage to plaintiff, sale thereunder, plaintiff the purchaser, and in March, 1857, sheriff's deed to him: held, that plaintiff cannot maintain ejectment against defendant W. on his sheriff's deed; that defendant, claiming title through foreclosure of the first mortgage, and being in possession, cannot be dispossessed by B. *Brown* v. *Winter*, 14 Cal. 34.

135. Assuming that by the recital, defendant became bound to pay plaintiff's mortgage debt, still he had a right to pay it by a sale and purchase under the first mortgage. *Ib.*

136. Under a decree of foreclosure and sale, H. had come into possession of the mortgaged premises. Subsequently, on appeal to the supreme court, the decree was reversed, with direction that the sale under it be set aside, that defendants in the suit be restored to the property sold,

and that the court below should proceed to dispose of the case in pursuance of the principles of the opinion. The court below, on filing the remittitur, entered a decree setting aside said sale, restoring defendants to possession, directing plaintiff to deliver up possession; awarding a writ of restitution, in case of refusal, vacating the credit given on the decree of foreclosure—the plaintiff having bought in the property—and ordering an account of the rents and profits of the premises while in the hands of H., with an injunction pending the account: held, that the order of the court below for an account of the rents and profits was right; that the general direction by this court to the court below, to proceed in pursuance of the principles of the opinion of this court, was mere formality, neither giving authority, nor limiting the powers of the court below; that without such direction that court could only act in subordination to the principles declared by this court; that the question of rents and profits being left open by this court, indicated that it was to be passed upon by the court below; that there is no distinction as to the right to have the corpus of the property restored on reversal of the decree under which it was sold, and the restoring of the rents and profits received from its use; and that the restitution of both is essential to making the party whole. *Raun* v. *Reynolds*, 15 Cal. 468.

137. Where a party gets into possession of property, as a water ditch, under a sheriff's sale on a foreclosure of a mortgage, and the judgment on which such sale was made is afterwards reversed by the supreme court, and restitution of the property is ordered, the court below may, on motion, order such party in possession to account before a referee for the rents and profits received by him—that is, for the sales of water, etc. The right to such rents and profits being clear, the court will not, on a mere question of remedy, compel a direct suit for them. *Ib.* 469.

138. The common law method, in such cases, of an inquisition of damages by a sheriff's jury on the writ of restitution, would be impracticable in estimating the rents and profits of a water ditch—involving, as the inquiry would, the receipts from sales of water every day for a long period, as also payments, expenses, etc. This is in its nature an equity proceeding—at least, to be disposed of according to equity practice. *Ib.* 470.

139. The party so in possession, under sheriff's sale, is in no better position than if it be entered directly under the mortgage, to enforce which the sale was made; and having received the proceeds of the property by way of sales of water, and appropriated the same to his own use, he cannot hold the property bound by the mortgage, and at the same time refuse to give the mortgagor the benefit of the amount so received. In equity he is not a purchaser, but a mortgagor; and though the sale was not set aside until after the receipt of the rents and profits, still, when it was set aside, the order took effect upon the relations of the parties as they existed before the sale—the mortgagors and the mortgagee have the same rights they had before. *Ib.* 471.

140. The foreclosure in this case did not merge the mortgage—at least, for all the purposes of this question as to accounting for the rents and profits. H. or his assignee was as much mortgagee after the decree as before. The reversal of the decree would not affect the mortgage, and if H. had entered into possession after the decree, but before any sale, he would have been bound to account for what he had received as mortgagee. Possibly the lien of the mortgage might have been destroyed by the judgment, but the mortgage was not destroyed, nor the relations of the parties as mortgagor and mortgagee. *Ib.*

141. Where plaintiff has two mortgages on the same property—the property being indivisible—and one of the mortgages is not due, he may nevertheless file his bill, and have a decree for the foreclosure of both. And if the second mortgage becomes due before the decree, then defendant cannot defeat the action as to this mortgage by tendering the money due on the first mortgage, after the maturity of the second. The jurisdiction of the court over the subject matter having attached, the court should close the controversy by settling all things involved in the litigation. *Hawkins* v. *Hill*, 15 Cal. 500.

142. The proceeding for a foreclosure of the equity of redemption, as those terms are understood where the common law view of mortgages is maintained, is unknown to our system, so far at least as

the owner of the estate is concerned. *Goodenow* v. *Ewer*, 16 Cal. 468.

143. The mortgagee can here in no case become the owner of the mortgaged premises, except by purchase upon a sale under judicial decree, consummated by conveyance. *Ib.*

144. Proceedings in the nature of a suit to foreclose an equity of redemption, held by a subsequent incumbrancer, may be maintained by a purchaser under the decree, where such incumbrancer was not made a party to the original suit to enforce the mortgage. Such incumbrancer may be called upon to assert his right, by virtue of his lien, and his equity of redemption, extending to the period provided by the statute of limitations, be thus reduced to the statutory period of six months. *Ib.*

145. The owner of the mortgaged premises, where no power of sale is embraced in the mortgage, cannot under any circumstances be cut off from his estate, except by sale in pursuance of the decree of the court. To give validity to such decree, the owner must be before the court when it is rendered. No rights which he possesses can otherwise be affected, and any direction for their sale would be unavailing for any purpose. *Ib.*

146. What is meant by sheriff's deeds, made on sales under decrees in foreclosure suits, taking effect by relation from the date of the mortgage, explained. *Ib.* 469.

147. D. and M. are owners each of one undivided one-half of certain real estate. D. executes a mortgage to plaintiffs upon his undivided half, which was recorded on the same day. Subsequently D. and M. conveyed to defendant, E., an undivided one-third of the entire property—making D., M. and E. each owners of one undivided third—one-half of E's interest being subject to the mortgage to plaintiffs. Plaintiffs foreclose—making D. alone party—get judgment for the amount due, and a decreee directing a sale of all the interest D. had at date of mortgage. At the sale plaintiffs become the purchasers for the full amount of their judgment, costs, etc., and in due time receive a sheriff's deed, no redemption being made. Meantime, but subsequent to the decree and before the sheriff's deed, E. purchases the remaining interest of D. and M. Plaintiffs sue for the sale of the property—a partition being impossible without prejudice—and for an account from the tenant in possession; and ask to be reimbursed from the proceeds of the sale the one-third of the amount bid by them at the sale under their decree of foreclosure, on the ground that the decree was invalid as to the one-sixth interest conveyed to E.; and that plaintiffs believed, at the time of their bid, they were acquiring a title to all the interest D. had at the date of his mortgage to them; and that the sheriff stated such interest was offered for sale: held, that the bid of plaintiffs, being for the full amount of their judgment, satisfied it; and that the effect of this satisfaction was to discharge the undivided one-sixth held by E. from the lien of the mortgage. *Ib.* 470.

148. Held, also, that plaintiffs cannot be reimbursed in the amount bid, even though they acted under a mistake as to the effect of the decree and sale thereunder; that their mistake was one of law, against which courts of equity seldom relieve in an independent action—the weight of authority in the United States being not to relieve, unless the mistake be accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence. *Ib.*

149. Held, also, that upon proper application, in the original foreclosure suit, the court would have released the plaintiffs from the purchase, set the sale aside, and opened the decree, and allowed them to file a supplemental complaint, bringing ing in E. and others interested, as parties. *Ib.*

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1. *Parties.*

150. Where a plaintiff in an action to foreclose a mortgage against a party who has died since the service of summons and before judgment, asks for a decree of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the suit. *Belloc* v. *Rogers*, 9 Cal. 125.

151. A decree of discharge under the insolvent act from the payment of a note secured by mortgage, does not release the lien of the mortgage. A person claiming an interest in the mortgaged premises subsequent to the mortgage, is a proper party to the foreclosure suit, but cannot be sub-

jected to the costs of the foreclosure beyond those occasioned by his own separate defense. *Luning* v. *Brady*, 10 Cal. 267.

152. All persons interested in the premises prior to the suit brought to foreclose a mortgage or to enforce a mechanic's lien, whether purchasers, liens, devisees, remainder men, reversioners or incumbrancers, must be made parties, otherwise their rights will not be affected. Persons who acquire interests by conveyance or incumbrance, after suit brought, need not be made parties. *Whitney* v. *Higgins*, 10 Cal. 552.

153. The general rule of courts of equity in foreclosure suits is, that all persons materially interested should be made parties in order that complete justice may be done and multiplicity of suits avoided. *Montgomery* v. *Tutt*, 11 Cal. 314.

154. Subsequent incumbrancers are not, however, indispensable parties to a foreclosure suit. If not made parties their rights cannot be affected; and they are not bound by the decree. *Ib.* 315.

155. Where a mortgage is given to secure the separate debts of several persons as mortgagees, it is a several security, and may be enforced by each creditor as in case of a separate mortgage. But where other parties are interested in the property, the court will require them to be brought in before ordering a sale or foreclosure. *Tyler* v. *Yreka Water Co.*, 14 Cal. 217.

156. Where, in such case, bill avers the other mortgagees are no longer interested, and they are not parties, demurrer for defect of parties does not lie. *Ib.*

157. A owes B a debt; to secure it A and C jointly mortgage to B a piece of land owned by them in common. Subsequently, A mortgages his undivided interested in the land to secure a debt to D. B forecloses against A and C, and buys in the whole land, not making D a party. The time for statutory redemption having expired, B. gets a sheriff's deed: held, that D, as subsequent mortgagee, may redeem A's, but not C's interest in the land, and that the sale is final as to C's interest, D not being a necessary party to a foreclosure. *Kirkham* v. *Dupont*, 14 Cal. 563.

158. The redemption money for A's interest would be the amount of B's mortgage debt, with interest, less one-half of the purchase money of the whole tract, sold as the land of A and C under the foreclosure sale. *Ib.* 566.

159. A subsequent purchaser of land mortgaged is a proper, if not necessary party to a foreclosure suit; and if the complaint be faulty in praying to hold him as trustee of the mortgagor, on account of fraud in the purchase, such defect cannot be reached by demurrer. *De Leon* v. *Higuera*, 15 Cal. 495.

160. Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of Wemple *v.* Pender, and has not yet a sheriff's deed: held, that injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession until the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; that if he chose to recognize the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff cannot complain —his rights not being affected by the proceedings, as he was not a party. *Macovich* v. *Wemple*, 16 Cal. 106.

161. Plaintiff, on obtaining his sheriff's deed, can then institute the necessary proceedings to enforce his rights, and the purchaser at the sheriff's sale under Wemple's decree will occupy no better position than Wemple himself. But so long as Pender has any interest in the property, plaintiff cannot, in advance of his own title, or of the extinction of Pender's, come into equity to enjoin the sale. *Ib.*

162. A mortgagor, when he has not disposed of his interest, is a necessary party to a suit for a foreclosure and sale, under our law, even though no personal claim be asserted against him. If he has parted with the estate, his grantee stands in his shoes, and possesses the same right to contest the lien, and to object to the sale. And if the grantee be not made a party, the purchaser under the decree ac-

quires no title. *Goodenow* v. *Ewer*, 16 Cal. 468.

163. It is only when the owner of the estate—whether such owner be the mortgagor or his grantee—has had his day in court, that a valid decree can pass for its sale. Under such decree, the purchaser takes the title which the mortgagor possessed, whatever it may have been, at the execution of the mortgage. *Ib.* 469.

164. A decree in a foreclosure suit for the sale of the premises, where the mortgagor had transferred his estate in the premises previous to the institution of the suit, and his grantee was not made a party, is void so far as it orders a sale. *Boggs* v. *Hargrave*, 16 Cal. 563.

165. A foreclosure suit, under our system, is only a proceeding for the legal determination of the existence of the lien, the ascertainment of its extent, and the subjection to sale of the estate pledged for its satisfaction. Upon the validity and extent of that lien, the owner of the estate, whether mortgagor or his grantee, has a right to be heard, and no valid decree for the sale of the estate can pass until this right has been afforded to him. *Ib.* 564.

166. Only those who are beneficially interested in the claim secured on the estate mortgaged, are necessary parties to the foreclosure of a mortgage. *McDermott* v. *Burke*, 16 Cal. 590.

See PARTIES.

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2. *Decree.*

167. Where a mortgage was given to secure an indebtedness for which promissory notes were held, with an understanding that the notes were to be given up, and the personal responsibility canceled on a foreclosure of mortgage, the mortgagee was held not to be entitled to a personal judgment for any balance unpaid after a sale of the property. *Moore* v. *Reynolds*, 1 Cal. 352.

168. A mortgagee is entitled to a personal judgment against the mortgagor for the balance remaining unpaid after the sale of the premises. *Ib.* 353.

169. Under the two hundred and twenty-ninth section of the Practice Act, a subsequent judgment creditor having a lien has a right to redeem real estate sold by foreclosure of a previous mortgage in the hands of the purchaser. *Kent* v. *Laffan*, 2 Cal. 596.

170. Where a mortgage covers two lots, and the mortgagor conveys one with covenants of warranty, the purchaser would be entitled to be reimbursed by the mortgagor on the warranty, if the lot is subjected to the mortgage: held, therefore, that the mortgagor could not complain that the decree of foreclosure ordered the sale of the unconveyed lot for the payment of the mortgage, and if the mortgagee has no notice of those transactions he could have all the lots subjected to his mortgage. *Cheever* v. *Fair*, 5 Cal. 338.

171. A mortgage allowed costs of foreclosure, including counsel fees not exceeding five per cent. of the amount due: held, that the limitation of five per cent. applied to counsel fees alone, and did not include other costs. *Gronfier* v. *Minturn*, 5 Cal. 492.

172. Production of the original note and mortgage, and proof of service of summons, is sufficient to justify a decree of foreclosure on default. *Harlan* v. *Smith*, 6 Cal. 174.

173. It is error to decree that the sheriff should execute a deed to the purchaser on the foreclosure sale, the land being sold subject to redemption in six months. *Ib.*

174. A decree of foreclosure cannot be impeached, collaterally, because entered prematurely. The remedy is by a direct proceeding in the action. *Alderson* v. *Bell*, 9 Cal. 321; *Nagle* v. *Macy*, 9 Cal. 429.

175. In a foreclosure suit, judgment may be rendered for the amount found due upon the personal obligation to secure which the mortgage is executed. *Rollins* v. *Forbes*, 10 Cal. 300.

176. In a suit on a promissory note and mortgage, the court may give a general judgment for the amount due on the note, and at the same time a decree of foreclosure of the mortgaged premises. *Rowe* v. *Table Mountain W. Co.*, 10 Cal. 444.

177. Where a mechanic's lien attached on certain premises January 18th, 1856, and a suit was brought subsequent to the execution and record of the mortgage to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such

suit a sale was made, and after the expiration of six months, no redemption being had, a deed was executed to the assignee of the sheriff's certificate: held, that the right of the mortgagees to redeem the premises by paying off the incumbrance of the mechanic's lien was not affected by the decree and the proceedings thereunder; and that the purchaser of the premises upon a decree of foreclosure of the mortgage, having received his deed upon such purchase, was entitled to the same right to redeem. *Whitney* v. *Higgins*, 10 Cal. 551.

178. Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties, on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them as such assignors to institute suit on the note and mortgage, and a decree of foreclosure in such case, with directions to pay the money into court, to await the further decree of the court, is proper, or at least, there is no error in such a decree to the prejudice of the defendants. *Hunter* v. *Leran*, 11 Cal. 12.

179. In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that which is demanded in the bill. *Raun* v. *Reynolds*, 11 Cal. 19.

180. Where proceedings in a foreclosure suit were delayed by agreement, in consideration of the execution of a second mortgage on other property, in which third parties joined as additional security, and subsequently plaintiff filed a supplemental bill setting up the second mortgage, and asking a sale of the premises described in both mortgages, judgment was taken by default for the debt, and the court decreed a foreclosure of the several mortgages and a sale of the property conveyed, and directed that the property described in the mortgage executed by Reynolds should be first offered for sale, but that no bid should be received for a less sum than the full amount of judgment and costs. If this sum was not bid, then the whole property included in the two mortgages was to be sold together: held, that the decree was erroneous. *Ib.* 20.

181. The omission of the words "be sold," in a judgment of foreclosure, after the description of the premises, is a mere clerical error, which will not affect the judgment. *Moore* v. *Semple*, 11 Cal. 361.

182. In this State, parties are at liberty to adopt, in the foreclosure of mortgages, the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises, and the application of the proceeds to its payment; and apply after sale for the ascertainment of any deficiency, and execution for the same; or they may take a formal judgment for the amount due in the first instance. *Rowland* v. *Leiby*, 14 Cal. 157.

183. In a foreclosure suit the decree will not apportion the debt among the several cotenants of the land, who acquired undivided interests therein at the same time, and subsequent to the execution of the mortgage. *Perre* v. *Castro*, 14 Cal. 531.

184. Where plaintiffs obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them, and the decree being in the usual form, for the amount due, sale of the premises, application of the proceeds, and execution against the property of the husband for any deficiency, and after the entry of the decree the husband died: held, that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency. *Cowell* v. *Buckelew*, 14 Cal. 641.

185. Where, in a foreclosure suit, the judgment is in the usual form—ascertaining the amount due, directing a sale of the mortgaged premises, application of the proceeds to the payment of the debts, providing for the recovery of any deficiency, and authorizing execution for the same—such judgment does not become a lien on the real estate of the debtor from the time it is docketed. *Chapin* v. *Broder*, 16 Cal. 421.

186. Section two hundred and forty-six of the Practice Act authorizes, in foreclosure suits, a personal judgment against the mortgagor, in addition to the relief usually granted; and such personal judgment, when docketed, becomes a lien. But the mere contingent provision for execution, in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as

a judgment lien, until the amount of the deficiency to be recovered has been ascertained and fixed. *Ib.*

187. In this latter case, the limitation upon the lien does not commence to run until the deficiency be ascertained, and an execution can be issued therefor. *Ib.*

188. The decree in a foreclosure suit, under the old equity system, usually directed the mortgagor to assert his right by payment of the principal sum due, interests and costs, within a designated period, or be barred of his equity. The decree operated directly upon the property, and its effect was to restore the same, upon payment, to the mortgagor; or to vest, upon failure of payment, an absolute title in the mortgagee. To give any efficiency to the decree, it was essential that the owner of the equity should be brought before the court; and he was an indispensable party to a valid foreclosure. *Goodenow* v. *Ewer*, 16 Cal. 467.

189. Courts of equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings, rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property, or the estate sold, provided application be made to them in the suits in which such decrees are entered, within a reasonable time, and the relief will not operate to the prejudice of the just rights of others. *Ib.* 470.

190. The nature and extent of the relief in such cases are matters resting very much in the sound discretion of the court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or to the parties, to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply, and from such, courts of equity seldom relieve. *Ib.*

191. In this case relief cannot be granted, as no special circumstances are shown, and no excuse offered for neglecting to apply for relief in the original foreclosure suit. And further, this action is not brought directly for relief from the sale, but for a sale of the property, an account as incident to a partition, and distribution of the proceeds among the owners, tenants in common thereof; and D., the mortgagor, is not made a party. *Ib.* 471.

192. The rights of plaintiffs to proceeds arising from the sale must be limited by the extent of the interest they acquired in the premises under their conveyance—that is, to one-third; and from this one-third, their proportionate share of the costs and expenses of the action and subsequent proceedings must be deducted. *Ib.* 472.

193. The doctrine of *caveat emptor* applies only to sales made upon valid judgments; and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases, a defect of title is no ground for interference with the sale, or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to the title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy, or the lien of the judgment; and that he may possibly acquire nothing. *Boggs* v. *Hargrave*, 16 Cal. 564.

194. A somewhat different rule prevails in cases where particular property is the subject of sale, by a specific adjudication; as where the interest of A. in a certain tract is decreed to be sold. To the validity of a decree of this character, the presence of A is essential; and when present, the decree binds him and is effectual, by the sale it orders, to transfer his estate. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest may not constitute a valid title; it may not, in fact, be of any value; and the purchaser takes the risk. To that extent the doctrine of *caveat emptor* applies even in those cases, and in all cases of adjudication upon specific interests, but no further. The interest specifically subject to sale, whatever it may be worth, a purchaser is entitled to receive; it is for that interest he makes his bid and pays his money. *Ib.*

195. A purchaser, under a decree of this character may petition to be released from his purchase, or that the sale be set aside, where it has been subsequently discovered that the court rendering the decree had not acquired jurisdiction of the subject matter; or of persons having interests in the property; or for other reasons, that the estate directed to be sold would not pass. *Ib.* 565.

196. Where a purchaser at a sale under a decree in a foreclosure suit, directing the sale of the premises—which decree, was void because the grantee of the mortgagor was not made party—brought suit against the mortgagees to recover back the money paid them on his bid: held, that the action does not lie, the purchaser being aware at the time of his bid that the mortgagor had sold the premises before the institution of the foreclosure suit, and there being no fraud. *Ib.*

197. The purchaser in such case makes a mistake of law as to the effect of the decree when the grantee of the mortgagor is not made party to the foreclosure suit. From such mistake no relief can be granted in an action at law. *Ib.*

198. Plaintiff must seek relief from the consequences of the invalidity of the decree, by proceedings in the foreclosure suit. By his act of purchase he has submitted himself to the jurisdiction of the court in that suit, as to all matters connected with the sale, and is entitled to apply for such relief as the facts of the case may justify. Upon his application, that court may direct the sale to be set aside and the satisfaction to be canceled, and authorise a supplemental bill for a resale of the premises to be filed and conducted in the name of the complainants in that suit, for the plaintiff's benefit, and direct that the grantee of the mortgagor, and any other persons interested in the premises, be brought in as parties; or it may make such other and different order in the matter as will protect the rights of all parties, and mete out exact justice. *Ib.* 566.

See JUDGMENT, REDEMPTION.

III. UPON THE HOMESTEAD.

199. Treating the mortgage as a mere security for the purchase money of a homestead, it is evident that the debt could not be lost by the acceptance of a new mortgage intended to supply the old one and secure the same debt.* *Dillon* v. *Byrne*, 5 Cal. 457; *Carr* v. *Caldwell*, 10 Cal. 385.

200. B bought premises and executed a note for part payment, which was afterwards transferred to plaintiff, who then loaned an additional sum and took his note and a new mortgage on the same lot and another lot, and canceled the first mortgage. In a suit to foreclose the mortgage, B's wife intervened and claimed the premises as a homestead: held, that the land was liable for the remainder of the purchase money, no matter to what purpose it might be devoted. *Dillon* v. *Byrne*, 5 Cal. 457; *Birrell* v. *Shie*, 9 Cal. 107; *Carr* v. *Caldwell*, 10 Cal. 385; *Swift* v. *Kraemer*, 13 Cal. 530.

201. Where an action is brought to foreclose a mortgage upon property claimed as a homestead, the wife of the mortgagor is a necessary party to the adjustment of the controversy, and should be allowed to intervene. *Sargent* v. *Wilson*, 5 Cal. 507.

202. Where a married man, whose wife never resided in this State, purchased a lot of land and resided upon it, which he then mortgaged, his wife not joining therein, and subsequently his wife came to this State and resided with him on the mortgaged premises: held, that the character of homestead was never impressed upon the premises until the actual residence of the family thereon, and therefore the homestead exemption cannot be sustained against the mortgage. *Cary* v. *Tice*, 6 Cal. 630; *Rix* v. *McHenry*, 7 Cal. 91; *Benedict* v. *Bunnell*, 7 Cal. 246.

203. A, a married man, mortgaged the homestead to B without the concurrence of his wife, and A and his wife subsequently mortgaged to C, and B and C both foreclosed their mortgages, neither making the other a party; whereupon C filed a

*The homestead act was passed in 1851, statutes p. 296. In 1854, the opinion in *Taylor* v. *Hargous*, 4 Cal. 273, held that there could be no abandonment or mortgage of the homestead, except by the joint act of husband and wife. This decision was repeatedly affirmed until 1859, when the court, in *Gee* v. *Moore*, 14 Cal. 478, reversed all previous cases, and held that there could be an abandonment or mortgage without the concurrence of the wife, which latter decision has been adhered to in several later cases. In 1860, statutes, p. 311, the act has been amended so as to require a registry of the homestead, and an abandonment must be by deed acknowledged and recorded after execution by husband and wife, and there can be no mortgage on the homestead.

bill against B to set aside the decree of foreclosure of the latter, alleging that the homestead premises did not exceed in value $5,000: held, that C could urge the same objections to the mortgage of B that A and his wife could; that B's decree was a cloud upon the title, and impaired the security, and that C was entitled to have it set aside. *Dorsey* v. *McFarland*, 7 Cal. 346; *Van Reynegom* v. *Revalk*, 8 Cal. 76.

204. A mortgage of the homestead signed by the husband alone is absolutely void, where its value does not exceed $5,000. When the husband ceases to be the head of the family the right to the homestead also ceases. *Revalk* v. *Kraemer*, 8 Cal. 74; *Van Reynegom* v. *Revalk*, 8 Cal. 76; *Cook* v. *Klink*, 8 Cal. 353; *Moss* v. *Warner*, 10 Cal. 298; *Lies* v. *De Diablar*, 12 Cal. 329.

205. Where, after judgment of foreclosure had been taken in an action against the husband solely, on a mortgage on the homestead premises executed by him alone, the husband and wife joined in a mortgage to a third party: held, that the foreclosure bound no one as to the homestead, and that the second mortgage was absolute as against the homestead. *Van Reynegom* v. *Revalk*, 8 Cal. 76.

206. Where A, who is a married man, is occupying premises as the tenant of B, and concludes to purchase the same, and to do so borrows the whole of the purchase money from C, and to secure the payment thereof to C mortgages the premises to him, but the wife does not sign the mortgage: held, that the homestead right was subject to the mortgage. *Lassen* v. *Vance*, 8 Cal. 274.

207. The homestead right is not affected by the foreclosure of a mortgage signed by the husband alone. *Cook* v. *Klink*, 8 Cal. 353.

208. In the action to foreclose a mortgage against a husband who sets up the right of homestead, the court should order the wife of defendant to be brought in as a party, as no decision of the question of homestead can be conclusive, either upon the husband or wife, unless both are parties. *Marks* v. *Marsh*, 9 Cal. 97.

209. The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party, she may intervene, or, by permission of the court, be allowed to file a separate answer, the plaintiff having the liberty to amend his complaint if any matters are set up in the answer which he might wish to anticipate by further allegation. *Moss* v. *Warner*, 10 Cal. 297.

210. Where commissioners were appointed by the court to select and set apart as a homestead a portion of the tract of land mortgaged, such portion to be of the value of $5,000, in form as compact as possible, including the place where the dwelling house is situated, and to report their action to the court; and the commissioners acting under oath made the selection and the report was approved: held, that the proceeding was proper. *Ib.* 298.

211. V, a married man, purchased a lot of land of G, and gave a mortgage on the lot to G for the purchase money; G subsequently obtained a decree of foreclosure of the mortgaged premises. On the day advertised for the sale, and just before the sale was to take place, V borrowed of C money for the purpose of paying off the mortgage and decree, and agreed to give C a mortgage on the premises to secure the money so loaned; V paid off the decree and G's mortgage was satisfied. Within a few minutes thereafter V gave a mortgage to C on the premises in accordance with the agreement. V's wife did not join in the mortgage. At the time of C's loan, and the execution of the mortgage therefor, the premises were occupied by V and his wife as a homestead; V died soon after, and his wife claimed the premises as a homestead: held, that C's mortgage took the place of G's, and was and is a valid lien on the premises to the extent of the money applied to the satisfaction of G's mortgage. *Carr* v. *Caldwell*, 10 Cal. 385.

212. When a mortgage is given as security for the purchase money of the mortgaged premises, no homestead can be carved out of the property so as to impair the rights of the mortgagee. *Montgomery* v. *Tutt*, 11 Cal. 193.

213. A mortgage of the homestead of the family executed by the husband only is void. To make such mortgage valid the wife should join with the husband in the execution of it. *Lies* v. *De Diablar*, 12 Cal. 329.

214. An order of the probate court setting apart property as a homestead will

not defeat a mortgage which has properly vested as a lien upon the property, where the mortgagor was not a party to such proceedings. *Ib.* 330.

215. In a mortgage of the homestead, the premises need not be described as the homestead. *Pfeiffer* v. *Riehn*, 13 Cal. 649.

216. Action to recover certain real estate as the homestead of plaintiffs. Complaint avers that plaintiff K. alone executed to C. his note, and a mortgage on the property in question to secure its payment. C. foreclosed, making K. and his wife, and also several persons holding subsequent mortgages, parties. K. and wife made default, but the other defendants answered, asking for a sale of the property and a decree settling all priorities, etc. The court ordered a sale of the property, and that, in case of insufficiency of the proceeds to satisfy all the mortgages, they be paid in a certain order—C.'s mortgage being last: held, that plaintiffs cannot recover without showing that these subsequent mortgages were invalid and insufficient to pass the title, because the complaint avers the sale to have been made under them as well as under the mortgage to C. *Klink* v. *Cohen*, 15 Cal. 201.

217. Under the Act of 1851, prior to its amendment in 1860, mortgages upon the homestead, executed by the husband alone, were not absolutely void, but were invalid only to the extent required for the protection of the husband and wife in the enjoyment of their homestead rights. *Bowman* v. *Norton*, 16 Cal. 217.

218. Where, under the Act of 1851, both husband and wife unite in a conveyance of the homestead, the homestead rights are relinquished, and persons to whom the husband alone had mortgaged the homestead previous to such conveyance may enforce their mortgages against the property in the hands of the grantee. *Ib.* 218.

219. The Act of 1860 materially changes the provisions of the Act of 1851, and renders any mortgage hereafter of the homestead, except to secure or pay the purchase money, invalid for any purpose whatever. *Ib.*

See HOMESTEAD.

IV. CHATTEL MORTGAGE.

220. A chattel mortgage, which stipulates for the enjoyment of the possession of property by the mortgagors until breach of the conditions, is invalid by the statute of frauds against third parties. *Meyer* v. *Gorham*, 5 Cal. 324.

221. If the mortgagee took immediate and actual possession of the property, in the absence of any contract concurrent or subsequent in the mortgage, conferring any greater authority than that contained in the mortgage, he cannot claim by virtue of such possession, because the covenants of the mortgage show that he was not entitled to the possession. *Ib.*

222. A party who purchases at sheriff's sale, stock of an incorporation, knowing that the certificates of such stock have been previously mortgaged, is chargeable with notice of the fact, and takes subject to the claim of the mortgagee. *Weston* v. *Bear River and Auburn W. & M. Co.*, 6 Cal. 429.

223. H. has a mortgage on chattels executed by M., in whose possession by the terms of the mortgage they were to remain. Upon default in paying interest or principal the mortgagor was to surrender possession. H. attaches M. for interest due and for other debts, and levies on the chattels in M.'s hands. The constable agrees with H. to hold the property for him both on the attachment and the mortgage, and M. consents. H. exercises some control over the property. The defendant, as sheriff, now levies on the property at the suit of *R.* v. *M.*, takes possession from the constable and pays the attachment of H. H. sues the sheriff in replevin, and offers on the trial to prove that the attachment and judgment in *R.* v. *M.* are false, fraudulent and collusive: held, that the court below erred in rejecting the evidence; that on default of paying interest, it was M.'s duty to give up possession; that his assent to the possession of H. after the constable's levy was sufficient to entitle H. to the property, subject only to his own attachment. *Hackett* v. *Manlove*, 14 Cal. 89.

224. A mortgage of chattels, the possession remaining in the mortgagor, is good against all persons, except subsequent purchasers, and bona fide creditors. *Ib.*

225. A sheriff in such case has no better rights than the creditor he represents, and the creditor is not one of the two classes in whose favor a mortgage unaccompanied by possession is void, to wit: bona fide creditors, or subsequent purchasers. *Ib.* 90.

226. Where, from an instrument transferring shares of stock as security for a note, and from other circumstances, the transaction is clearly a loan, a clause of foreclosure on nonpayment, or a provision that the mortgagee may take the property for the debt, does not make the instrument any the less a mortgage. *Smith* v. '49 & '56 *Quartz Mining Co.*, 14 Cal. 246.

227. A mortgagee of stock in such a case does not get an absolute title to the stock by the mere default of payment of the mortgage debt. *Ib.* 247.

228. The rule, under our statute, as to the delivery of possession of the mortgaged personal property, is not more strict than that held by the English and United States courts under the statute of fraud. *Chaffin* v. *Doub*, 14 Cal. 386.

229. A mortgage is a security for a debt, and cannot exist independently of the relation of debtor and creditor between the parties. *People* v. *Irwin*, 14 Cal. 435.

230. If it were shown that the consideration for the conveyance was a pre-existing debt, these provisions would afford very strong evidence that the debt had not been extinguished, and that the conveyance was intended as a mortgage to secure its payment. *Ib.* 436.

231. A mortgage on its face given to secure a promissory note, is prima facie given in good faith, and to secure a "just indebtedness," within the first section of the chattel mortgage act of 1857. *Ede* v. *Johnson*, 15 Cal. 57.

232. Under that act, "a residence" stated to be "in Sierra county, California," is sufficiently stated. And an "occupation" stated as that of "late merchant, of Pine Grove," etc., is sufficient. *Ib.*

233. The object of this provision in the statute is identification. It is not an indispensable requisite to the validity of the mortgage, which would be valid if it stated the parties to have no occupation or profession. *Ib.*

234. So where the mortgage is conditioned to pay a note "according to the tenor and conditions thereof," and the note is recited as a certain promissory note for the payment of the sum of $3,500 on the sixth day of June, A. D. 1858, at said Pine Grove, with interest at the rate of two per cent. a month, from date till paid," the statute is complied with as to "setting out the sum to be secured, the rate of interest to be paid, and when payable." *Ib.*

235. Under the chattel mortgage act of 1857, a mortgage of shares of stock in an incorporated company is valid without a transfer on the books of the company, as is required by the corporation act of 1853, relative to pledges of stock by delivery of the certificates. The act of 1853 has no effect on the act of 1857. *Ib.* 58.

236. At one time, seven shares of stock in a company are pledged by defendant to plaintiff as security for a note of defendant then executed. At another time, twenty more shares are pledged as security for another note of defendant then executed. In suit on the notes, and for sale of the stock, etc., the judgment was for the amount of the notes, and directed a sale of all the shares of stock: held, that the judgment was wrong so far as it ordered a sale of the stock in gross, and an application of the proceeds to the entire indebtedness. *Mahoney* v. *Caperton*, 15 Cal. 315.

See PLEDGE.

V. MORTGAGE OF A VESSEL.

237. In order to maintain that a mortgage on a vessel is void as to creditors, because not properly registered, it is absolutely necessary to show that the vessel in controversy was a "vessel of the United States," within the meaning of the registration acts of Congress, at the time of her seizure; and to do this it is necessary to show affirmatively every incident which entitles her to that privilege, or to show as much as would under those acts entitle her to a new register. *Davidson* v. *Gorham*, 6 Cal. 347.

238. Where a new owner under such sale mortgaged the vessel still at sea, neither the bill of sale nor the mortgage being registered at the port of departure where the vessel was registered: held, that the mortgage was good against attaching creditors of the new owner, who lev-

ied immediately on her arrival, neither party taking the requisite steps to obtain a new registry, as the vessel had lost her national character, and was not therefore subject to the provisions of the law requiring the registry of sales and mortgages. *Ib.* 348.

239. To make a mortgage valid on a seagoing vessel, the act of Congress requires it to be recorded, while our statute requires actual possession to be taken of the property itself. The entire right of the party to the same description of property depends in the contemplation of each act, solely and exclusively upon that which it alone prescribes. *Mitchell* v. *Steelman*, 8 Cal. 370.

240. Where A, the owner of a seagoing vessel, executes to B a mortgage thereon, which is recorded in the custom house of the home port, B commences suit to foreclose the mortgage, and makes C a party defendant thereto, on the ground that he has purchased the vessel subject to the lien of plaintiff's mortgage, C in his defense avers that the mortgage was void under our statute of frauds, and that he now held the vessel discharged from the same: held, that the mortgage was a valid lien, and that the record of the mortgage was a sufficient notice thereof to C. *Ib.*

241. To require a mortgagee in all cases to take possession of the vessel, is a harsh provision, and must operate greatly in restraint of commerce. How the master of a vessel who is a part owner could execute a mortgage, and still remain on board, under the stringent provisions of our statute, it is difficult to see. *Ib.* 374.

See ADMIRALTY.

VI. NOTES SECURED BY A MORTGAGE.

242. A mortgage is a mere incident to the debt which it secures, and follows the transfer of the note with the full effect of a regular assignment. *Peters* v. *Jamestown Bridge Co.*, 5 Cal. 336; *Bennett* v. *Taylor*, 5 Cal. 502; *Ord* v. *McKee*, 5 Cal. 516; *Bennett* v. *Solomon*, 6 Cal. 138; *Phelan* v. *Olney*, 6 Cal. 483; *Belloc* v. *Rogers*, 9 Cal. 125; *McMillan* v. *Richards*, 9 Cal. 411; *Nagle* v. *Macy*, 9 Cal. 428; *Hickox* v. *Lowe*, 10 Cal. 206; *Koch* v. *Briggs*, 14 Cal. 263.

243. A note was executed to O. as the agent of M., and the mortgage to secure the note was made to M. O., under a contract with M., was entitled to one-half of the note: held, that O., having a right to the note, had a right to foreclose the mortgage. *Ord* v. *McKee*, 5 Cal. 516.

344. Where a new note, on the same terms, between the same parties, for the same sum, and of the same date, is given as a substitute for a previous note secured by mortgage, the owner is entitled to a foreclosure on the new note. *Spring* v. *Hill*, 6 Cal. 18.

245. The endorsement and delivery of one of two notes secured by a mortgage carries with it a pro rata portion of the security. *Phelan* v. *Olney*, 6 Cal. 483.

246. The purchaser of one of two notes secured by a mortgage, and the assignee of the mortgage itself, takes the assignment with the notice of the equity of the holder of the other notes, as he is informed by the deed itself that it was given as security for two notes of equal amount, neither of which was due. *Ib.*

247. The holders of two notes secured by one mortgage stand in the same relation to the mortgaged premises until a discharge of the mortgage and acceptance of a different security. This discharge by one, though void as to the other, is valid as to the maker, and divests any lien which he had by virtue of said mortgage. *Ib.*

248. The discharge by a decree under the insolvent act from the payment of the note, did not release the lien of the mortgage executed to secure its payment. *Luning* v. *Brady*, 10 Cal. 267.

249. The averment in the complaint, that the plaintiff is the owner of the note and mortgage in suit, is sufficient answer to a demurrer, on the ground that it does not appear by the complaint that the plaintiff is the holder of the note. *Rollins* v. *Forbes*, 10 Cal. 300.

250. A note executed by the whole of the associates in a joint enterprise to three of them, the plaintiffs below, is equivalent, we think, to a note and mortgage executed by the defendants to the plaintiffs for an amount less, by the proportion of the number of plaintiffs to the defendants, and may be enforced in equity in like manner as if so executed. *McDowell* v. *Jacobs*, 10 Cal. 389.

251. In a suit on a promissory note and

mortgage, the court may give a general judgment for the amount due on the note, and at the same time a decree of foreclosure of the mortgaged premises. *Rowe* v. *Table Mountain Water Co.*, 10 Cal. 444.

252. A corporation may bind itself by a note and mortgage made by its president and secretary, and signed by them in their official capacity as such. *Ib.*

253. Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them as such assignees to institute suit on the note and mortgage; and a decree of foreclosure in such case, with directions to pay the money into court to await the further decree of the court, is proper, or at least, there is no error in such a decree to the prejudice of the defendants. *Hunter* v. *Leran*, 11 Cal. 12.

254. Where a husband and wife execute a note and mortgage, the note is good as to the husband, even if void as to the wife; and the property is bound by the mortgage, independent of the note of the wife. *Pfeiffer* v. *Riehn*, 13 Cal. 649.

255. Because a mortgage given to secure the payment of several notes falling due at different times provides for payment at times or in modes different from the notes, it is no objection to suit on the notes at maturity, The mortgage is not a part of the contract of indebtedness. *Robinson* v. *Smith*, 14 Cal. 98.

256. The fact that the purchaser of a note saw the mortgage and note, was no notice to him of any valid defense to the note. *Ib.* 100.

257. Where in a mortgage to secure the purchase money of land for which notes were given, falling due at different times, the condition was—"provided that previous to the dates of said payments, it shall have been decided by competent authority that the title to said land is fully vested in the party of the second part, and the party of the first part is given full and peaceable possession," the holder of one of the notes transferred before maturity may sue on it at maturity, although the title to the land has not been settled and peaceable possession not given. *Ib.* 100.

258. Where a mortgage is conditioned to pay a note "according to the tenor and conditions thereof," and the note is recited as a "certain promissory note for the payment of the sum of $3,500 on the sixth day of June, A. D. 1858, at the said Pine Grove, with interest at the rate of two per cent. per month from date till paid," the statute is complied with as to setting out the sum to be secured, the rate of interest to be paid, and when payable. *Ede* v. *Johnson*, 15 Cal. 57,

259. At one time, seven shares of stock in a company are pledged by defendant to plaintiff as security for a note of defendant then executed. At another time, twenty more shares are pledged as security for another note of defendant then executed. In suit on the notes, and for sale of the stock, etc., the judgment was for the amount of the notes, and directed a sale of all the shares of stock, and an application of the proceeds to the payment of the judgment: held, that the judgment was wrong. so far as it ordered a sale of the stock in gross, and an application of the proceeds to the entire indebtedness. *Mahoney* v. *Caperton*, 15 Cal. 315.

VII. Assignment of a Mortgage.

260. The purchaser of a mortgage cannot be charged with constructive notice of anything subsequent to the mortgage, except its assignment or satisfaction, duly entered of record; and a deed from the mortgagee to a third party, for a conveyance of the mortgaged premises, does not operate as an assignment of the mortgage. *Peters* v. *Jamestown Bridge Co.*, 5 Cal. 336.

261. Where a party cancels a mortgage, and executes a new one, the last mortgagees are, in equity, assignees of the debt paid, and will be subrogated to the rights of the assignors; for in equity the substance of the transaction would be an assignment of the old mortgage, in consideration of the money advanced. *Dillon* v. *Byrne*, 5 Cal. 456; *Birrell* v. *Schie*, 9 Cal. 107; *Carr* v. *Caldwell*, 10 Cal. 385; *Swift* v. *Kraemer*, 13 Cal. 530.

262. A mortgage is a mere incident to the debt which it secures, and follows the transfer of the note with full effect of a regular assignment. *Peters* v. *Jamestown Bridge Co.*, 5 Cal. 336; *Bennett* v. *Taylor*, 5 Cal. 502; *Ord* v. *McKee*, 5 Cal. 516;

Bennett v. *Solomon*, 6 Cal. 138; *Phelan* v. *Olney*, 6 Cal. 483; *Belloc* v. *Rogers*, 9 Cal. 125; *McMillan* v. *Richards*, 9 Cal. 411; *Nagle* v. *Macy*, 9 Cal. 428; *Hickox* v. *Lowe*, 10 Cal. 206; *Koch* v. *Briggs*, 14 Cal. 263.

263. Where two notes are secured by a mortgage, and a purchaser of the second note takes therewith an assignment of the mortgage, he takes with notice of the equity of the holder of the first note, as he was informed of the existence by the mortgage itself. *Phelan* v. *Olney*, 6 Cal. 483.

264. When the holder of the second note and assignee of the mortgage entered a discharge of the mortgage, and took a new security, the discharge was valid as to him, and divested his lien under the mortgage, though void as to the holder of the first note. *Ib.*

265. An assignment operating by its terms as a present and effectual change of ownership in the subject matter, the title is supposed, in law, to remain divested, until it be affirmatively shown that the condition of defeasance has happened. It is not unlike a chattel mortgage, which conveys the thing mortgaged, with power of use until the money secured is paid; and until payment is proven, all the right of the mortgagor to the mortgaged property passes to the mortgagee. *Myers* v. *South Feather W. Co.*, 10 Cal. 583.

266. Where an assignment of a note and mortgage has been made to the plaintiffs, to indemnify them as sureties on a bail bond for the assignor, and where suit is then proceeding on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage; and a decree of foreclosure in such case, with directions to pay the money into court to await the further decree of the court, is proper, or at least, there is no error in such decree to the prejudice of the defendants. *Hunter* v. *Leran*, 11 Cal. 12.

267. R. assigned a mortgage to F., made by a company to secure him as guarantor, delivering the mortgage at the same time to F., who retained it a few minutes, and returned it to R., to receive the interest from the company as his agent. The note guaranteed is unpaid. R. owes the company nothing: held, that after the assignment, R. had no interest in the mortgage which a judgment creditor could reach; that the delivery of the mortgage to R. for the purpose of collecting interest, there being no circumstance of fraud or suspicion, did not impair the rights of the assignee; that the liability of F., as guarantor, was a sufficient consideration for the assignment; and that such assignment is not a mortgage of a mortgage. *Hall* v. *Redding*, 13 Cal. 219.

268. A married woman cannot make an assignment of a mortgage without the concurrence of her husband. *Tryon* v. *Sutton*, 13 Cal. 493.

VIII. Lease of Mortgaged Property.

269. Where plaintiff leased a lot to B. for ten years, at a monthly rent, with a clause that the improvements were mortgaged as a security for the rent: held, that it was a mortgage and might be foreclosed on the nonpayment of the first month's rent. *Barroilhet* v. *Battelle*, 7 Cal. 452.

270. A party holding under an assignment of a recorded lease containing a mortgage clause, is bound to know the contents thereof, and is therefore subject to the mortgage, although the instrument is recorded in the book of leases, there being a privity of estate. *Ib.* 454.

271. Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: held, that the purchaser, under the mortgage sale, can require the tenant to pay the rent over again to him. *Mc Devitt* v. *Sullivan*, 8 Cal. 596.

272. A mortgagor cannot make a lease which will bind his mortgagee, where the lessee at the time has actual or constructive notice of the mortgage. *McDermott* v. *Burke*, 16 Cal. 589.

273. The interest of the lessee, in such case, depends for its duration—except as limited by the terms of the lease—upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and in this State, against the mortgagee; but with its enforcement, the leasehold interest is determined, even though the lessee be not made a party to the foreclosure suit. *Ib.*

274. There is no privity of contract or estate between the purchaser upon the decree of sale on foreclosure and the tenant of the mortgagor. The purchaser may treat the tenant as an occupant without right, and maintain ejectment for the premises—except where the purchaser is precluded by his acts or declarations from thus treating him. *Ib.*

275. The purchaser cannot, for want of privity, count upon the lease, and sue for the rent or the value of the use and occupation. The relation between the purchaser and tenant is that of owner and trespasser, until some agreement, expressed or implied, is made between them with reference to the occupation. The tenant is not bound to attorn to the purchaser, nor is the latter bound to accept the attornment if offered, unless the acts and declarations of the purchaser, anterior to the purchase, qualify the subsequent relation of the parties, or the rights springing from it. *Ib.*

276. There are cases where the purchaser on a sale under a decree of foreclosure would be estopped from treating the tenant of the mortgagor as a trespasser; as, for instance, when the lease was taken upon the encouragement of the mortgagee, and the purchaser was cognizant of the fact at the time of his purchase. *Ib.*

277. A tenant of the mortgagor is not interested either in the claim secured nor in the estate mortgaged—that is, in the title pledged as security. He has not succeeded to such estate, or to any portion of it. He does not stand in the position of a purchaser. The estate remains in his lessor; he has only a contingent right to enjoy the premises. The right of the lessor to the possession ends with the deed by which the sale of the premises is consummated; and the tenant's right to possession depends upon that of the lessor, and goes with it; and the tenant having notice, actual or constructive, of the mortgage, need not be made party to the foreclosure. *Ib.* 590.

278. Possibly, a court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold on foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *Ib.*

279. But the tenant has no such absolute right, from the mere fact of his tenancy, as to require him to be a party to the foreclosure, in order to vest the legal title in the purchaser under the decree. *Ib.*

IX. Writ of Assistance.

280. A writ of assistance will lie to put a party purchaser in possession of land under a decree of foreclosure of a mortgage. *Wolf* v. *Fleischacker*, 5 Cal. 244; *Montgomery* v. *Tutt*, 11 Cal. 191; *Reynolds* v. *Harris*, 14 Cal. 677.

281. In our system, the order to deliver possession should be first made, unless a direction to that effect is made in the decree; and if upon its service that is disregarded, the court can at once direct the writ of assistance to issue. *Montgomery* v. *Tutt*, 11 Cal. 193.

282. Prima facie, plaintiff in a foreclosure suit is entitled, after sale of the premises and sheriff's deed to him, to a writ of assistance as against the mortgagor, and those entering under him subsequent to the decree, if they refuse to surrender possession. *Skinner* v. *Beatty*, 16 Cal. 157.

283. Where in such case a writ of assistance is granted, and the mortgagor and his wife move to set it aside on the ground that they had moved upon and occupied the mortgaged premises as a homestead before the execution of the mortgage by the husband, and continually ever since, and it appears that the mortgage was given for the purchase money of the premises, the motion must be denied, even though the wife was not a party to the foreclosure. *Ib.* 158.

284. If a writ of assistance be improperly issued or executed, the court granting it can, on summary motion, set aside the writ or the service, and restore the possession. *Ib.*

MOTION.

1. The court should not entertain a motion to strike a paper from the files of the court on the ground of its being there by fraud or deception, unless copies of the

affidavit to be used on the motion and notice of the same be given to the opposite party. *Stevens* v. *Ross*, 1 Cal. 96.

2. An order is the judgment or conclusion of the court or judge upon any motion or proceeding. *Gilman* v. *Contra Costa County*, 8 Cal. 57.

3. A party who appears and contests a motion in the court below, cannot object, on appeal, that he had no notice of the motion. *Reynolds* v. *Harris*, 14 Cal. 677.

4. There is no statute of limitations against certain motions, and appellants may show that in consequence of various obstacles not within their control, there was no unreasonable delay in making the motion. *Ib.* 678.

5. The failure to prosecute a motion for a new trial is an abandonment of the motion. *Mahoney* v. *Wilson*, 15 Cal. 43; *Frank* v. *Doane*, 15 Cal. 303; *Green* v. *Doane*, 15 Cal. 304.

6. Where the examination of the sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render the appeal effectual, respondent's remedy is by motion in the court below for leave to proceed on the judgment, notwithstanding the undertaking, and not by motion in the supreme court to dismiss the appeal. *Dobbins* v. *Dollarhide*, 15 Cal. 375.

7. If a writ of assistance be improperly issued or executed, the court granting it can, on summary motion, set aside the writ or the service, and restore the possession. *Skinner* v. *Beatty*, 16 Cal. 158.

MUNICIPAL CORPORATION.

1. Municipal corporations, unless specially authorized, have no power to make the public, of which they were the representatives, liable to make compensation for the property which they should see fit to destroy for the purpose of staying the ravages of a destructive conflagration. *Dunbar* v. *City of San Francisco*, 1 Cal. 357; *Correas* v. *City of San Francisco*, 1 Cal. 452.

2. Where a municipal corporation, so far as she had any rights in a franchise, had by her own voluntary acts parted with them, any attempt on her part to resume them, by depriving the public of the easement or denying to purchasers of lots the right of way, except on payment of wharfage, etc., is clearly illegal. *Breed* v. *Cunningham*, 2 Cal. 368.

3. The power of a corporation to sell does not include an authority to create a new department of city government, to divert the revenues from the legitimate source, and place them in hands neither chosen by or responsible to the corporation, nor does it include the power to make a deed of trust with power to the trustees to sell the trust estate as they may deem advisable. *Smith* v. *Morse*, 2 Cal. 538.

4. Defendants were owners of a private railroad, constructed by them, and run with machinery, under a license from the city councils, through certain streets of San Francisco. The plaintiff claimed damages for injuries done to himself, his horse and wagon, in a collision with the railroad cars, charging the defendants with negligence: held, that where the streets of a city are diverted from their ordinary and legitimate uses, by special license to a private person, for his own benefit, and in the pursuit of a business which involves constant risk and danger, he is bound, in the exercise of such right, to use extraordinary care. *Wilson* v. *Cunningham*, 3 Cal. 243.

5. The right to fit up a building for city or public purposes, and provide suitable accommodations for the transactions of the business of the city, is a necessary incident to the administration of every municipal government. *People* v. *Harris*, 4 Cal. 9.

6. Where a municipality have the right to erect, repair and regulate wharves and the rate of wharfage, and the banks of the river, in front of the city, are dedicated to the public, it follows that the right to collect wharfage devolves on the corporation. *City of Sacramento* v. *Steamer New World*, 4 Cal. 43.

7. The words "public improvements," when applied to a municipal corporation, must be taken in a limited sense as applying to those improvements which are the proper subject of police and municipal regulations, and cannot be extended to subjects foreign to the object of the incorporation and beyond its territorial limits. *Low* v. *City of Marysville*, 5 Cal. 215.

8. The distinction between a grant to a person and a municipal corporation, as to denouncement for forfeiture, is very apparent. On the one hand, government has agreed that denouncement shall be the result of nonperformance; on the other hand, a corporation has delegated to it certain powers of government, and it is only in reference to those delegated powers that it will be regarded as a government. *Touchard* v. *Touchard*, 5 Cal. 307.

9. If a private natural person can grant lands upon conditions subsequent, and upon their nonperformance resume their ownership, a municipal corporation can do the like. *Ib.*

10. The thirty-second section of the charter of 1855 of the city of San Francisco was designed as a check upon the city government under that charter, leaving the previous indebtedness to stand as a matter the legislature could not interfere with. *Soule* v. *McKibbin*, 6 Cal. 142.

11. The act of March 27th, 1850, conferring upon the county courts the power of incorporating towns, is unconstitutional. *People* v. *Town of Nevada*, 6 Cal. 144; *Colton* v. *Rossi*, 9 Cal. 599.

12. Where a city ordinance authorizes the making of a contract by certain committees, on behalf of the city, "subject to confirmation by the common council of said city," a confirmation by joint resolution, and not by ordinance, is sufficient. *San Francisco Gas Co.* v. *City of San Francisco*, 6 Cal. 191.

13. The obligation of a municipal corporation to keep the streets in repair is necessarily suspended while they are actually undergoing such alterations as, for the time, render them impassable or dangerous. *James* v. *City of San Francisco*, 6 Cal. 530.

14. There is no constitutional inhibition against incorporating a portion of the inhabitants of a city as a county, or creating a county out of the territory of a city. *People* v. *Hill*, 7 Cal. 103; *People* v. *Mullins*, 10 Cal. 21; *People* v. *Beatty*, 14 Cal. 572.

15. Under the charter of the city of San José, an ordinance abolishing the office of street commissioner, and substituting fees instead thereof, is legal and binding on the officers. *Wilson* v. *City of San Jose*, 7 Cal. 276.

16. A municipal corporation, from the nature of the ends intended to be accomplished by its creation, is a compound being, acting in different capacities. *Holland* v. *City of San Francisco*, 7 Cal. 377.

17. Where, in a suit brought by a municipal corporation upon a contract made under an ordinance, the defendant offered to prove a parol change in the contract, which the court refused to allow: held, not to be error, as the change in the contract could only be by ordinance. *City of Sacramento* v. *Kirk*, 7 Cal. 420.

18. Where a municipal corporation has the power to perform an act, and in the execution thereof, the prescribed form is not followed, it has the power to subsequently ratify and confirm the informal act, so as to make it as binding as if originally done in the proper manner. *Lucas* v. *City of San Francisco*, 7 Cal. 469.

19. A municipal corporation, outside of its governmental capacity, is in many respects to be regarded the same as a private corporation, and its officers and agents through whom it acts must be presumed to know the contract it enters into, the purchases it makes, and the property it uses. *San Francisco Gas Co.* v. *City of San Francisco*, 9 Cal. 469.

20. The proposition that a municipal corporation can incur no liabilities otherwise than by ordinance, is not, in its full extent, tenable. Under some circumstances, a municipal corporation may become liable by implication. *Ib.*

21. The provisions of the charter of Sacramento, authorizing the improvement of the streets and the mode and manner of assessment, are not in conflict with the thirteenth section of the eleventh article of the constitution. *Burnett* v. *City of Sacramento*, 12 Cal. 83.

22. There is no difference in respect to the political and geographical divisions of the State between a municipal corporation and a county. They are both the subjects of its political dominion. *Pattison* v. *Supervisors of Yuba County*, 3 Cal. 184.

23. The legislature may authorize a municipal corporation to pay claims invalid in law, but equitable and just in themselves, subject to the constitutional provision of equality and uniformity. *People* v. *Burr*, 13 Cal. 349.

24. The powers of a municipal corporation are subject to be increased, restricted

or repealed, at the will of the legislature, according to the varying exigencies of the State; vested rights acquired thereunder, as under all laws, only remaining unaffected. *Ib.* 349.

25. Even if a municipal charter provides for a city attorney to attend to the business of the city, yet other counsel may be employed when necessary, especially if the legal business is abroad. *Smith* v. *City of Sacramento*, 13 Cal. 533.

26. The ayuntamiento of San Francisco, in 1850, by an order, authorized its alcalde to grant to plaintiff "a quantity of land, in conformity with the survey of the town, as near as possible to the location of certain other lots which plaintiff was to surrender to the town. The alcalde accordingly conveyed by deed a lot to plaintiff, which had been previously granted by the town to one Gerke: held, that an action for the breach of covenants of the warranty in this deed will not lie against the city. *Findla* v. *City of San Francisco*, 13 Cal. 535.

27. A general grant of the exclusive privilege of wharfage is wholly void, as exceeding the powers of a corporation, and it has the right to come into equity to remove this impediment from the free and beneficial exercise of its corporate functions and property. *City of Oakland* v. *Carpentier*, 13 Cal. 549.

28. The city of San Francisco holds the municipal lands of the pueblo not legally disposed of by grant or concession, and her title is wholly unaffected by sheriff's sales under execution against her, so far as these sales touch or affect the aforesaid pueblo lands. *Hart* v. *Burnett*, 15 Cal. 616.

29. The municipal lands to which the city of San Francisco succeeded were held in trust for the public use of that city, and were not either under the old government or new, the subject of seizure or sale under execution. *Ib.*

30. The people of a county are not a corporation, nor can they sue or be sued. *People* v. *Myers*, 15 Cal. 34.

31. A county is a corporation, and is the proper party plaintiff to object to a contract made by the board of supervisors for building a jail. *Ib.*

32. The agents of the corporation can sell or dispose of this property of the corporation, only in the way and according to the order of the legislature; and therefore the legislature may, by law operating immediately upon the subject, dispose of this property or give effect to any previous disposition or attempted disposition of it. *Payne* v. *Treadwell*, 16 Cal. 233.

33. The power to improve the streets necessarily included the authority to enter into a contract for that purpose, and it would be absurd to say that the city could not bind itself by a contract which it was legally authorized to make. It is certain that such a contract could not be treated as the contract of the property holders, and an action maintained upon it as against them. Their liability was exclusively to the city, and the manner of its enforcement was pointed out by the charter. *Argenti* v. *City of San Francisco*, 16 Cal. 263.

34. As to the contracts of corporations, the rule is, that where the question is one of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the contract cannot, in an action founded upon it, contest its validity. And this rule applies with equal force to all corporations, public or private. *Ib.* 264.

35. Contracts of corporations, whether public or private, stand on the same footing with the contracts of natural persons, and depend on the same circumstances for their validity and effect. The doctrine of ratification and estoppel is as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner, and to the same extent, as the latter. *Ib.* 265.

36. As a rule, the powers of corporations, municipal or others, must be exercised in the mode pointed out by the charter. But even a want of authority is not, in all cases, a sufficient test of the exemption of the corporation from liability in matters of contract. An executory contract, made without authority, cannot be enforced; but where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned. *Ib.* 273.

37. Plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which contracts were executed by such officer in his official capacity, made

valuable and permanent improvements to the city, for the exclusive benefit of it and its inhabitants; such improvements were made under the immediate supervision of an officer of the city, and when completed, were approved of and received by him, on behalf of the city; plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay, as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition to pay: held, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their performance, it would be a fraud on plaintiff to permit her now to repudiate them. *Ib.* 274.

38. Nor can plaintiff recover on some of the warrants so drawn, for the further reason, that they do not specify the appropriations under which they were issued, nor the date of the ordinances making the same, as is required by the eighth section of the third article of the city charter; and they would not constitute any authority to the treasurer to pay them, even if there were funds in the treasury specially appropriated for their payment. *Ib.* 276.

39. The mayor and controller of said city having drawn warrants on the treasurer thereof, payable out of the street assessment fund, in favor of plaintiff, for the improvements so made under said contracts: held, that plaintiff cannot recover on the warrants; that being payable out of a particular fund, they are neither bills of exchange nor promissory notes, and that the treasurer must pay from that fund, and no other. *Argenti* v. *City of San Francisco*, 16 Cal. 276; *Martin* v. *City of San Francisco*, 16 Cal. 286.

40. As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money, or other property, which does not belong to her, and to liabilities springing from neglect of duties imposed by her charter, from which parties are enjoined. Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter—as for instance, upon the issuance of bills of credit. *Argenti* v. *City of San Francisco*, 16 Cal. 284.

41. The charter of 1851 of the city of San Francisco vested the legislative power of the city in a common council, consisting of a board of aldermen and a board of assistant aldermen, each composed of eight members, and provided that no ordinance or resolution should be passed unless by a majority of all the members elected to each board. On the fifth of December, 1853, the mayor of the city approved of what purported to be an ordinance passed by the common council, providing for the sale of certain slip property of the city. This ordinance is designated in the official book of city ordinances as ordinance number four hundred and eighty-one. At the time the ordinance was presented to the board of assistant aldermen, there was a vacancy in the board, occasioned by resignation of one of its members, so that there were but seven members in office. Of these seven, four members voted for the ordinance, and three against it: held, that the ordinance not having received a majority of the entire board—of the constituent number—was never passed, but was in fact rejected. *McCracken* v. *City of San Francisco*, 16 Cal. 618.

42. The alleged ordinance number four hundred and eighty-one authorized and required the mayor and joint committee on land claims of the city to sell the property specified at public auction, to the highest bidder, at such time and place as they might think advisable, after not less than ten days' advertisement. The sale was advertised for December 26th, 1853. Within one hour previous to the sale, the common council passed an ordinance, designated in the official book as ordinance number four hundred and ninety-three, appropriating certain proceeds of the intended sale: held, that this recognition of the existence of ordinance number four hundred and eighty-one, and the appropriation of a portion of the proceeds of the sale, did not constitute an adoption and

approval of what had been previously done, or might be subsequently done according to the terms of that ordinance, so as to give validity to the sale which took place. *Ib.*

43. The only authority the common council possessed to sell city property was derived from the thirteenth section of article three of the charter, and this section provides for the sale of the property in one way only, to wit: by the passage of laws, which term is synonymous with ordinances, when applied to acts of municipal corporations. The mode of selling the property having been pointed out by the charter, was restrictive—no other mode could be followed. *Ib.* 619.

44. The only way in which the common council could give validity to a sale, was by passing a law directing it. Ordinance number four hundred and ninety-three does not purport to provide for any sale, but simply assumes that an ordinance ordering a sale had already passed; but this assumption could impart no vitality to the alleged ordinance number four hundred and eighty-one. The common council could pass a law or ordinance only in one way, and that was by voting for it. *Ib.* 620.

45. The land directed by the terms of ordinance number four hundred and eighty-one to be sold, was set apart and dedicated as a public dock by an ordinance passed in 1852, and while this dedicating ordinance remained in force, no sale could be legally had. In dedicating the land to public use, the common council exercised powers purely of a governmental nature, and not those of a mere property holder. It was by legislation that the dedication was made, and only by legislation could the public franchise be destroyed. *Ib.*

46. The distinction taken between the powers of a municipal corporation, when acting in its political and governmental character, and when acting with reference to its private property, has no application to the questions involved in the case at bar. Its powers, whether regarded as political or governmental, or those of a mere private corporation, could be exercised only in conformity with the provisions of the charter. The legislature could impose such restrictions as it thought proper, and it saw fit to require the formalties of legislation for the disposition of the city property, as it did for the imposition of taxes, the regulation of the fire department, and matters connected with the general welfare of the city. *Ib.* 621.

47. *Holland* v. *The City of San Francisco*, 7 Cal. 361, distinguishable from this case is in this: that there, the fact that the property had been previously dedicated to public use as a public dock was not presented; but that case is not law, and is overruled, so far as it holds that ordinance number four hundred and ninety-three recognized and adopted ordinance number four hundred and eighty-one, so as to render the subsequent sale valid and binding upon all parties. *Ib.*

48. Admitting that ordinance number four hundred and ninty-three did adopt and pass number four hundred and eighty-one, it did so only within one hour previous to the sale. But this ordinance directs the sale upon ten days' previous advertisement. The authority to sell upon ten days' notice was not therefore pursued, and the sale without such notice was void. *Ib.* 622.

49. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given; and where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. *Ib.* 623.

50. Where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance. *Ib.*

51. A ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able, at the time, to make the contract to which, by his ratification, he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself. *Ib.* 624.

52. Ordinance number five hundred and five of the city of San Francisco, passed January 10th, 1854, by which the mayor and land committee were authorized to pay out of moneys in their hands, arising from the sale ordered by ordinance num-

ber four hundred and eighty-one, the salaries of the members and officers of the police for the months of November and December of the previous year, does not ratify ordinance number four hundred and eighty-one, because appropriating the proceeds of the sale. It assumes that ordinance number four hundred and eighty-one was valid, and there is nothing in the appropriation from which an intention to ratify can be implied. If the intention to ratify under some circumstances could be thus implied, the implication would be of no avail in the present case, as the common council were at the time laboring under the mistaken impression that ordinance number four hundred and eighty-one had become law. Ratification, to be effective, must be made with full knowledge of all the facts relating to the act ratified. To entitle any proceedings of the common council to the slightest consideration as evidence of ratification, it must be shown that those proceedings were taken with full knowledge that the ordinance had never passed, and that the sale thereunder was an absolute nullity. *Ib.* 625.

53. Inasmuch as by article six, section six, of the charter of San Francisco of 1851, the common council could authorize a sale of city property at public auction only, ratification of a previous sale is impossible. The object of the ratification is to vest in the previous purchaser the title; but at public auction there would be no certainty of this, for at the auction every one would be at liberty to bid, and the property would fall to the highest bidder. *Ib.* 626.

54. The city of San Francisco is not estopped from denying the sale made under ordinance number four hundred and eighty-one, and asserting title to the property sold. The matters relied upon by way of estoppel, with the exception of ordinance number four hundred and ninety-three, occurred after the sale, and could not have influenced the plaintiff in his purchase. Ordinance number four hundred and ninety-three, directing an appropriation of a portion of the anticipated proceeds, was passed within one hour of the sale, and it nowhere appears that the same was ever brought to the notice of the plaintiff. Nor does it appear that there was any fraud or intention to deceive on the part of the common council. They acted, in passing ordinance number four hundred and ninety-three, and in the subsequent use of the proceeds, upon the impression that a valid ordinance authorizing the sale had been passed. *Ib.* 627.

55. The doctrine of estoppel, as laid down in *Biddle Boggs* v. *Merced Mining Co.*, 14 Cal. 280, controls the question here. *Ib.*

56. Even if the city would be estopped from denying the sale, and from asserting title to the property sold, it does not follow that the plaintiff would be estopped from claiming a return of the money he paid. The doctrine of estoppel in pais is applied to prevent a wrong-doer from asserting claims against his declarations or conduct, not to prevent an innocent party from enforcing his rights. It is the wrong-doer who is estopped, upon the principle that he shall not take advantage of his own wrong. *Ib.*

57. The sale of the city's property in this case being without authority and void, the plaintiff is not required to surrender possession of the property before he can maintain an action to recover back the purchase money. *Ib.* 627.

58. The fifth section of article three of the charter of 1851 of the city of San Francisco, as to the city's not incurring debts beyond $50,000, under certain circumstances, is directory, and is not a limitation of the power of the common council as to the amount of debts and liabilities to be incurred. *Ib.* 628.

59. This section of the charter refers only to the acts or contracts of the city, and not to liabilities which the law may cast upon her. It was intended to restrain extravagant expenditures of the public moneys, not to justify the detention of the property of her citizens which she may have unlawfully obtained; and where, as in this case, plaintiff claims that the city has got his money without consideration—by mistake—and has appropriated it to municipal purposes, she is bound to refund; because the law—not her contract or permission—renders her liable. Her liability in this respect is independent of the restraining clauses of the charter; it arises from the obligation to do justice—to restore what belongs to others—which rests upon all persons, whether natural or artificial. *Ib.* 630.

60. The restriction contained in the

fifth section of the charter can, in any view, only apply to liabilities dependent for their creation upon the volition of the common council, and hence does not include liabilities arising from torts, or trespasses, or mistakes. *Ib.* 631.

61. The sale of December 26th, 1853, under ordinance number four hundred and eighty-one, being void, no title passed to the purchasers at that sale. The title to the property still exists in the city, except where deeds have since been taken under the acts of 1858 or 1860. The property remaining can at any time be taken possession or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert her title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money. *Ib.* 632.

See CORPORATION, ORDINANCE.

MURDER.

1. The defendant was indicted for murder, tried, convicted of manslaughter only, and then obtained a new trial: held, that on the new trial upon the same or another indictment, he can plead the former conviction of manslaughter as an acquittal of the crime of murder, but may be convicted again of manslaughter. *People* v. *Gilmore*, 4 Cal. 376; *People* v. *Backus*, 5 Cal. 278.

2. In an indictment for murder, it is sufficient to describe the deceased by the name by which he was commonly known. *People* v. *Freeland*, 6 Cal. 97; *People* v. *Kelly*, 6 Cal. 212.

3. A motion to set aside an indictment for murder on any ground which would have been good ground for challenge either to the panel or any individual grand juror, cannot be made in the district court when the defendant has been held to answer in the court of sessions before indictment. *People* v. *Freeland*, 6 Cal. 97.

4. To reduce the crime of murder, charged in the indictment, to manslaughter, a provocation must be established, apparently sufficient to render the passion irresistible. *Ib.*

5. In an indictment for murder, an error in the middle name of the deceased is not material. *People* v. *Lockwood*, 6 Cal. 206.

6. Where a juror in a trial for murder stated on his voir dire that he had expressed an opinion as to the guilt or innocence of the prisoner, and that such opinion, when expressed, was without qualification: held, that he was properly challenged by the prisoner, and should have been rejected. *People* v. *Williams*, 6 Cal. 207.

7. An indictment for murder, charging that the accused on or about a certain day did willfully, feloniously, and with malice aforethought, kill, murder, and put to death a certain person with a pistol and knife, without specifying further the facts and the manner, is bad. *People* v. *Aro*, 6 Cal. 209.

8. Murder is a conclusion of law, drawn from certain facts. *Ib.*

9. An indictment must contain a statement of the acts constituting the offense. *People* v. *Aro*, 6 Cal. 208; *People* v. *Hood*, 6 Cal. 238; *People* v. *Wallace*, 9 Cal. 31.

10. In an indictment for murder, the time of the death must be stated, so that it can be legally considered the consequence of the felony charged. *People* v. *Aro*, 6 Cal. 209; *People* v. *Lloyd*, 9 Cal. 56; *People* v. *Steventon*, 9 Cal. 275.

11. An indictment for murder need not state the time when the crime was committed, except that it was before the finding of the indictment and within one year and a day before death ensued from the wound or assault. *People* v. *Kelly*, 6 Cal. 212.

12. Where the defendant was indicted and convicted of murder, and on appeal a new trial was ordered on the ground of objection to a juror, whereupon, on motion of the prosecution, the indictment was set aside on account of irregularities in the summoning and empanneling of the grand jury, and subsequently a new indictment was found by a new grand jury, under which the prisoner was convicted: held, that the second trial and conviction did not put the prisoner "twice in jeopardy for the same offense," as it is apparent that the prisoner was not in jeopardy by the

first trial, which had been held to be erroneous. *People* v. *March*, 6 Cal. 546.

13. The provision of the criminal code which empowers courts to set aside indictments on motion of the prosecution, is not limited to cases of defects in the instrument itself, and such a dismissal is no bar to a subsequent prosecution for the same offense amounting to a felony. *Ib.*

14. On a trial under an indictment for murder, a verdict of "guilty" imports a conviction of every material allegation, and is therefore a conviction for murder. *Ib.*

15. On a trial for murder, evidence of a difficulty between the prisoner and other persons connected with the deceased on the same day, prior to the killing, and at which the deceased was not present, is admissible for the purpose of showing a conspiracy on the part of the prisoner and others against the deceased and others; and of connecting the two difficulties together. *People* v. *Stonecifer*, 6 Cal. 410.

16. The crime of murder is committed at the time when the fatal blow is struck. *People* v. *Gill*, 6 Cal. 638.

17. There can be no murder without malice, either expressed or implied. *People* v. *Moore*, 8 Cal. 93.

18. On a trial for murder, it is not error to instruct the jury that if the killing was the result of deliberation, no matter for how short a period, it would be murder in the first degree under our statute; where the evidence was sufficient to warrant the jury in finding the fact, that the killing was deliberate and premeditated. *Ib.*

19. On a trial for murder, weakness of mind, fear and excitement of the defendant, produced by the violence of the deceased, will not justify the homicide. *People* v. *Hawley*, 8 Cal. 391.

20. Mere words of reproach, without further cause or provocation, will not mitigate an intentional homicide committed with a deadly weapon, so as to reduce it to manslaughter. *People* v. *Butler*, 8 Cal. 441.

21. The facts necessary to constitute the crime of murder are, that a wound was inflicted with a felonious intent, that the wound was mortal, and that death ensued from the effects of the wound within a year and a day. *People* v. *Steventon*, 9 Cal. 275.

22. An indictment charging "murder in the first degree" is good, as that offense includes the second degree and manslaughter. *People* v. *Dolan*, 9 Cal. 583.

23. The substantial facts necessary to constitute the crime charged must appear in the indictment with sufficient certainty to enable the court to pronounce a proper judgment, and the party to defend against the charge; but they need not be stated with the particularity required at common law. *Ib.*

24. Evidence of the dying declaration of a deceased person is admissible on a trial for murder. *People* v. *Glenn*, 10 Cal. 36.

25. In an indictment for murder it is not necessary that the indictment should specifically aver that the crime was "willful, deliberate and premeditated. It is sufficient to charge the crime in the words of the statute. *People* v. *Murray*, 10 Cal. 310.

26. An indictment for murder, which describes the weapons used by which death was produced, as a "loaded pistol," is sufficient, though it omits to state the manner in which the weapon was charged. *People* v. *Choiser*, 10 Cal. 311.

27. Where an indictment charged the defendants with the crime of murder, committed by them at a designated place and upon a designated day, by "shooting and wounding the deceased through the body, with a leaden bullet, discharged from a rifle, of which wound the deceased then and there died:" held, that it was not necessary to state in the indictment on what part of the body of the deceased the wound was inflicted, and that the indictment stated sufficiently that the wound was mortal. *People* v. *Judd*, 10 Cal. 314.

28. When an indictment for murder is used as a substitute for and in the place of an indictment for manslaughter, it must, where time is material, contain the averment as to time which would be essential in an indictment for manslaughter. *People* v. *Miller*, 12 Cal. 294.

29. There is no distinction between an indictment for murder, which, if good for manslaughter, shows on its face that the crime for manslaughter is barred, and an indictment for the special offense of manslaughter within the same statement as to time. *Ib.* 295.

30. On an indictment for murder, the verdict must state whether it be murder

in the first or second degree. *People* v. *Marquis*, 15 Cal. 38.

31. On an indictment for murder, the court of sessions is not bound to assign counsel for prisoner. *People* v. *Moice*, 15 Cal. 331.

32. Challenges to the panel of the grand jury, or to individual jurors, must be made at the empanneling of the jury; and on indictment for murder, transferred to the district court, the challenge cannot there be made. *Ib.*

33. Indictment for murder. Plea, self-defense. Testimony conflicting as to facts occurring at the time of homicide. M., a witness for prosecution, testified that he was present August 24th, at a difficulty between defendant and deceased, in the course of which defendant discharged a double barreled shot gun at deceased, who fell forward; that immediately thereafter witness approached deceased, and saw lying on the ground about six feet forward of him, a pistol, which witness had previously seen in deceased's possession. Witness then detailed the circumstances immediately connected with the difficulty, in which he himself, armed with a pistol, took part with deceased against defendant; and then stated that the pistol he saw lying on the ground, deceased borrowed from C. some time before August 24th; that C. had given the pistol to deceased, who said he would clean it; and that he (witness) had often, since then, and before August 24th, seen the pistol in deceased's possession. Defendant's counsel then asked witness this question: "At the time C. gave the pistol to Sweeny, (deceased) was anything said by S. with reference to using the pistol against the defendant?" Objected to and ruled out as irrelevant and incompetent, unless evidence was produced tending to show that the thing said had come to the knowledge of defendant: held, that the court erred; that the evidence was admissible; that the declaration of deceased made at the time of procuring the weapon was part of the res gestæ, and illustrative of the transaction; that it showed the purpose for which the weapon was procured, and that this purpose was an item of proof upon the question, which of the two parties first assaulted—this being the point to which the testimony was offered. *People* v. *Arnold*, 15 Cal. 480.

34. The mere fact that one man threatens to kill another does not justify the latter in killing the former. The threats must be shown to have been communicated to the accused before they are admissible as evidence for him for any purpose—and then the effect and bearing of the testimony should be explained by the judge to the jury, before the case is finally submitted to them. *Ib.*

35. Defendant killed deceased while he was in the act of injuring a mining claim. On the trial, defendant offered to show that he was the owner, and in the lawful possession of said claim at the time of the killing. The court refused testimony to this point: held, that defendant had a right to prove his ownership of the claim, for the purpose of showing his mental condition, the motives which prompted his action, and determining the character of the offense; that the ownership was part of the res gestæ, and should have been admitted, subject to instructions of the court as to its legal effect, though when admitted, it may not have amounted to a justification. *People* v. *Costello*, 15 Cal. 353.

36. On the trial upon indictment for murder, the only witness for the prosecution who saw the transaction itself, testified in substance, that he and Tung Hoy met a large number of their countrymen, Chinese, six of whom took them out into the chapparal, tied him, and then one of the Chinese struck Tung Hoy on the head with a sword, another pierced him in the back, when he fell, and witness then escaped, and has never since seen him. The court instructed the jury that if the evidence of this witness were true, defendants were guilty of murder in the first degree: held, that the court erred; that such instruction assumed the homicide, which was not proven by the witness. *People* v. *Ah Fung*, 16 Cal. 138.

37. On an indictment for an assault with intent to commit murder, defendant plead guilty to an assault with a deadly weapon with intent to commit bodily injury, and upon this plea, was adjudged to pay a fine of $1,200, or be imprisoned in the county jail. Defendant appeals: held, that the supreme court has no jurisdiction of the appeal, the offense for which defendant was punished being a misdemeanor only. *People* v. *Cornell*, 16 Cal. 188.

See CRIMES AND CRIMINAL LAW, FELONY, INDICTMENT, MANSLAUGHTER.

NAME.

1. The code permits a party defendant whose name is unknown to be sued by any name. *Morgan* v. *Thrift*, 2 Cal. 563.

2. If an undertaking has to be executed by the plaintiff and is executed to the defendant by a wrong name, the latter has his remedy and may describe it as given to him, and may show that he was the party intended. *Ib.*

3. The defendant was sued and served by the name of George Mott, and judgment entered against him by the same name; afterwards, and without notice to defendant, the plaintiff, on his own motion, obtained an order from the court to amend the judgment, by altering the name from George to Gordon: it was held to be error. *McNally* v. *Mott*, 3 Cal. 235.

4. The use in a sale note of a given name for the goods sold is a warranty that they bear that name. *Flint* v. *Lyon*, 4 Cal. 20.

5. The fact that a Spanish name can be translated into English so as to mean nothing, does not alter or affect its potency as a name descriptive of a place. *Castro* v. *Gill*, 5 Cal. 42.

6. In an indictment for murder, it is sufficient to describe the deceased by the name by which he was commonly known. *People* v. *Freeland*, 6 Cal. 97; *People* v. *Kelly*, 6 Cal. 212.

7. In an indictment for murder, an error in the middle name of the deceased is not material. *People* v. *Lockwood*, 6 Cal. 206.

8. Where a defendant is sued as John ——, service was returned upon James ——, and judgment was rendered against J.——: held, to be in error, unless there was something in the record to show that the person served was the person sued. *Sutter* v. *Cox*, 6 Cal. 415.

9. The answer of the defendant waives the alleged error as to the change of parties, whereby the name of a defendant has been substituted for that of another without notice. *Smith* v. *Curtis*, 7 Cal. 587.

10. An objection was taken to the deposition of J. D. Marley in that he was described in the notice as Dick Marley, but it is obviated by the testimony of Marley that he was as well known by that as his proper name. *Jones* v. *Love*, 9 Cal. 71.

11. It is no ground of demurrer to a complaint, that the christian name of one of the plaintiffs does not appear. The court cannot judicially know that one of the plaintiffs had either a christian or heathen name, or that it is necessarily untrue that he has forgotten it if he had. *Nelson* v. *Highland*, 14 Cal. 75.

12. Where a man is sued by a fictitious name, and the return of the sheriff on the summons shows service on defendant by his proper name, as "John Doe alias Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, without proof that Doe and Westfall are the same. *Curtis* v. *Herrick*, 14 Cal. 120.

13. The State prison contract was not defectively executed by the commissioners, from the fact that they signed it with their individual names, and not with the name of the State. The contract purports, in its body, to be between the State, acting by the commissioners, under the act of the 21st of March, 1856, of the one part, and Estell on the other, and is signed by the commissioners, with the affix of "board of State prison commissioners." The instrument does not purport to be the act of the commissioners alone, but the act of the State by them. The State, by them, makes the lease and contract, and it is with the State that the lessee enters into the covenants and agreements contained in the indenture. *State of California* v. *McCauley*, 15 Cal. 456.

NATURALIZATION.

1. The power to naturalize is made a judicial power by act of Congress. *Ex parte Knowles*, 5 Cal. 301.

2. The provision of the constitution of the United States which gives Congress the power to establish "a uniform rule of naturalization" is construed to mean, that the rule when established shall be executed by the States. *Ib.*

3. Under the act of Congress of 1802, "every court of record in any individual State having common law jurisdiction and a seal, and clerk or prothonotary, shall be

considered as a district court within the meaning of this act," and such courts have power to naturalize. *Ib.*

4. The supreme court of this State, having exclusive appellate jurisdiction, has no power to naturalize. *Ib.* 302.

5. The legislature of California has by express enactment conferred jurisdiction on the district courts of this State to grant naturalization, according to the rules established by Congress. *Ib.* 306.

6. All other courts of this State being courts of inferior and limited powers, and although some are courts of record, yet having only statutory and not common law jurisdiction, they have no power to grant naturalization, and any attempt of the kind by them would be coram non judice and void. *Ib.*

7. The declaration of a grand juror, that he is a naturalized citizen, should be received by the court as prima facie true, and proof thereof, by actual production of the papers, is unnecessary. *People* v. *Roberts*, 6 Cal. 215.

See ALIEN, ELECTION.

NEGLIGENCE.

1. An action to recover damages for collision cannot be sustained where the injury complained of has resulted from the negligence of both parties. *Kelly* v. *Cunningham*, 1 Cal. 366.

2. A vessel in the harbor of San Francisco, moored in the usual track of bay and river steamers, should set a light and keep a watch in a dark night, or she cannot recover damages for an injury sustained by being run into by a steamer, where there was neither gross negligence nor intentional wrong on the part of the steamer. The want of such watch and light is to be deemed negligence per se, and the court should instruct the jury in such case to find a verdict in favor of the defendant. *Innis* v. *Steamer Senator*, 1 Cal. 460.

3. In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained; but if it be alleged that he was retained in consideration of certain reasonable fees and rewards to be paid him, and no future time is stated as agreed upon for the payment of such fee, the declaration must aver payment, and the omission of this is error. *Covillaud* v. *Yale*, 3 Cal. 110.

4. In cases of simple negligence, the rule governing the measure of damages is, to allow the actual damages. The allowance of "smart money" in such cases is improper. *Moody* v. *McDonald*, 4 Cal. 299.

5. A pledge is a bailment which is reciprocally beneficial to both parties, and therefore the law requires of the pledgee the exercise of ordinary diligence in the custody and care of the goods pledged, and he is responsible for ordinary negligence. *St. Losky* v. *Davidson*, 6 Cal. 647.

6. There is no doubt that ditch owners are responsible for wanton injury or gross negligence, but they are not liable for mere accidental injury where no negligence is shown, to a miner locating above the line subsequent to the construction of the ditch. *Tenney* v. *Miners' Ditch Co.*, 7 Cal. 340.

7. Neglect to sue a contractor for his first breach of contract does not operate so as to release his sureties for subsequent breaches. *City of Sacramento* v. *Kirk*, 7 Cal. 420.

8. A person who undertakes the erection of a building or other work for his own benefit is not responsible for injuries to third persons, occasioned by the negligence of a person or his servants who are actually engaged in executing the whole work under an independent contract. *Boswell* v. *Laird*, 8 Cal, 490.

9. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had neglected to sue in due time, and had given no notice of demand and protest. *Kritzer* v. *Mills*, 9 Cal. 23.

10. Where a notary did not faithfully perform his duty in taking an acknowledgment, but was guilty of gross and culpable negligence, by a mistake made therein, he is responsible to the party injured for the damages resulting from this negligence. *Fogarty* v. *Finlay*, 10 Cal. 245.

11. If the notary read the certificate before signing it, an omission must have

been known to him; if he did not read it, he is equally guilty of negligence. *Ib.*

12. The question of negligence in the management of, and the degree of it, must necessarily depend, in a great measure, upon the surrounding facts, such as the existence and exposure of property below the dam, and the like; for what under one state of facts would be prudence, might, under a different condition of things, be gross or even criminal negligence. *Hoffman* v. *Tuolumne County Water Co.*, 10 Cal. 416; *Wolf* v. *St. Louis Independent Water Co.*, 10 Cal. 544.

13. An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel, where, if the neglect were excusable, full relief might have been had on motion in the original action. *Borland* v. *Thornton*, 12 Cal. 445.

14. In an action against a railroad company, for running over a horse and killing him, the plaintiff has the right to prove the custom of the country, "to permit domestic animals to roam at large upon the unenclosed commons," where the defense is negligence on the part of the plaintiff, in allowing the horse to run at large. *Waters* v. *Moss*, 12 Cal. 538.

15. Gross negligence, but not the want of reasonable care on the part of another, can be set up in defense to an action for damages for the injuries thus suffered. *Fraler* v. *Sears Union Water Co.*, 12 Cal. 558.

16. To charge an attorney with negligence in failing to set up a defense based upon certain facts communicated to him by his client, he must show by evidence the existence of such facts, and they were susceptible of proof at the trial by the exercise of proper diligence on the part of his attorney. *Hastings* v. *Halleck*, 13 Cal. 209.

17. Where in a suit a question has been made and decided by the supreme court, counsel cannot be charged with negligence in acting upon that decision as the law of the case. *Ib.* 210.

18. Where one having a claim to collect agreed with another to take his claim against the common debtor and treat it as his own in any suit brought for the debt, costs and expenses to be shared pro rata, and afterwards prosecuted both claims to judgment in his own name, and in his own name bought the property of the defendant on execution sale, and left it with an agent for sale, he is not liable to an action for money had and received or in indebitatus assumpsit. For gross negligence or bad faith, he would be responsible in a different form of action. *Herrick* v. *Hodges*, 13 Cal. 433.

19. Common carriers are liable for the slightest neglect. They are held to extraordinary diligence and care. And in case of injury, the presumption is prima facie, that it occurred by the negligence of the coachman. The onus probandi is on the proprietors to show no negligence, and that the injury was occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. *Fairchild* v. *California Stage Co.*, 13 Cal. 601.

20. Skillful or unskillful and negligent conduct of a case is an important subject of inquiry in an action by an attorney for the value of his professional services; anything which shows the services were not of the value claimed—as the nature of the suit conducted, its little difficulty, small amount, little skill requisite, absence of skill—is competent, under the issue of value. *Bridges* v. *Paige*, 13 Cal. 641.

21. A trial may result successfully and yet the attorney be guilty of negligence. His want of skill or neglect may put the client to great expense to redeem his mistakes. *Ib.* 642.

22. Where in an action against a steamer for setting fire to plaintiff's fence, the jury was instructed, among other things, to find specially as to the negligence of the captain or crew of the steamer, and they found generally for plaintiff, four hundred dollars damages; and, also, that the steamer's spark-catcher was not sufficient to prevent sparks from communicating with the shore and endangering property; the verdict was held good in the absence of any objection at the time of its rendition, that it was not responsive to the special direction. *Algier* v. *Steamer Maria*, 14 Cal. 171.

23. Probably the finding apart from the general verdict was a finding of negligence; for an insufficient spark-catcher is hardly distinguishable from none at all; and this is proof of negligence. *Ib.*

24. The fact that fire was communicated from the engine of defendant's cars

to plaintiff's grain, with proof that this result was not probable, from the ordinary working of the engine, is prima facie proof of negligence, sufficient to go to the jury. *Hall* v. *Sacramento Valley R. R. Co.*, 14 Cal. 388.

25. To charge the officers of a corporation with a loss sustained by a stockholder in a diminution of the value of the stock, alleged to have been caused by their mismanagement, it would appear very clearly that the loss was occasioned by their gross negligence or willful misconduct. *Neall* v. *Hill*, 16 Cal. 151.

NEGRO.

1. The arrest and commitment for deportation of fugitive slaves does not determine their slavery. It leaves that to future adjudication. *Ex parte Perkins*, 2 Cal. 438.

2. A statute is not ex post facto, and impairs no obligation which derives no right nor constitutes the refusal to return to servitude a crime, but simply provides for the deportation of slaves. *Ib.* 440.

3. If the slaveholder had authority to bring his slaves here under the constitution of the United States, the right could not be abridged or controlled until the admission of California as a State. *Ib.*

4. The constitution of the United States recognizes a property in the class of persons known as slaves, and the institution is a social and political one. *Ib.*

5. The civil and criminal codes exclude the negro, black and mulatto, as witnesses against or for a white person, and this is to designate the race as between white, black and Indian. *People* v. *Hall*, 4 Cal. 399; *Speer* v. *See Yup Co.*, 13 Cal. 73; *People* v. *Elyea*, 14 Cal. 146.

6. The indicium of color is not an infallible test of the competency of a witness under the act excluding black mulattoes and Indians from testifying for or against white persons. *People* v. *Elyea*, 14 Cal. 145.

7. The right of transit through each State with every species of property known to the constitution of the United States and recognized by that paramount law is secured by that instrument to each citizen, and does not depend upon the uncertain and changeable ground of mere comity. *Ex parte Archy*, 9 Cal. 162.

8. The character of immigrant or traveler bringing with him a slave into this State must last so long as it is necessary, by the ordinary rules of travel, to accomplish a transit through the State. Nothing but accident or imperative necessity could excuse a greater delay. Something more than mere ease or convenience must intervene to save a forfeiture of property which he cannot hold as a citizen of the State through which he is passing. But visitors for health or pleasure stand in a position different from travelers on business, and are protected by the law of comity. *Ib.* 165.

9. It is the right of the judiciary, in the absence of legislation, to determine how far the policy and position of this State will justify the giving a temporary effect, within the limits of this State, to the laws and institutions of a sister State. To allow mere visitors to this State for pleasure or health to bring with them, as personal attendants, their own domestics, is not any violation of the end contemplated by the constitution of this State. *Ib.* 166.

10. The privileges extended to visitors cannot be extended to those who come for both business and pleasure. A mere visitor is one who comes only for pleasure or health, and engages in no business while here, and remains only for a reasonable time. If the party engage in any business, or employ his slave in any business, except as a personal attendant upon himself or family, then the character of visitor is lost, and his slave is entitled to freedom. *Ib.* 168.

See FUGITIVE SLAVES.

NEW MATTER.

See ANSWER, XIII, 7.

NEW TRIAL.

I. In general.

1. A judgment was obtained in the court of first instance which was transferred to the district court. The defendant in that action filed his complaint against the plaintiff, the judgment creditor in the district court, alleging fraud in the recovery of that judgment, and praying to have the judgment set aside and a new trial had. The defendant answered the complaint and denied the allegation, and the court set aside the judgment and awarded a new trial: held, that this was a final judgment in the cause, and that the new trial awarded was to be had in the first action and not in the second. *Belt* v. *Davis*, 1 Cal. 139.

2. It is useless to put parties to the additional trouble and expense of a new trial, when we see clearly that after, perhaps, a protracted litigation, the result must be the same. *Tohler* v. *Folsom*, 1 Cal. 213; *Smith* v. *Compton*, 6 Cal. 26.

3. When a cause was appealed from, but the record showed no tangible point whereupon the judgment in the court below was rendered, the appellate court under the code of 1850* has the power to grant a new trial, with instructions to the inferior court to require the parties to frame an issue upon regular pleadings. *Mena* v. *Leroy*, 1 Cal. 219.

4. Instead of remanding a cause for a new trial, where the judgment below is erroneous, this court will so modify it as finally to settle the controversy, when the rights of the parties appear from the record to be fully ascertained. *Persse* v. *Cole*, 1 Cal. 371.

5. The report of a referee should be taken advantage of by filing written objections to the entry of judgment thereon, or by a motion for a new trial, setting forth the grounds of the alleged error. *Porter* v. *Barling*, 2 Cal. 73.

6. If there be no exception in the report showing that the referee erred in part, and the rule of law by which he arrived at his conclusions be not disclosed, the court cannot disturb the report, and an order granting a new trial will be reversed. *Tyson* v. *Wells*, 2 Cal. 130.

7. The power to grant or refuse new trials is one of legal discretion, and the abuse of it only will justify the appellate court in interfering with such order. *Drake* v. *Palmer*, 2 Cal. 181; *Cooke* v. *Stewart*, 2 Cal. 353; *Speck* v. *Hoyt*, 3 Cal. 420; *Watson* v. *McClay*, 4 Cal. 588; *Duell* v. *Bear River and Auburn W. and M. Co.*, 5 Cal. 86; *Hastings* v. *Steamer Uncle Sam*, 10 Cal. 341; *Hanson* v. *Barnhisel*, 11 Cal. 340; *Kimball* v. *Gearheart*, 12 Cal. 48; *Burnett* v. *Whitesides*, 15 Cal. 36; *Peters* v. *Foss*, 16 Cal. 358.

8. It is error to refuse a new trial where justice requires that the cause should be resubmitted. *Ross* v. *Austill*, 2 Cal. 192.

9. If the report of a referee contain sufficient on which to base a judgment, it is the duty of the court to enter judgment in accordance with the report as far as concerns the matter referred, and not entertain any objection thereto except on a motion for a new trial, when the report can be set aside. *Headley* v. *Reed*, 2 Cal. 324.

10. No power lies in a district court to set aside a judgment or grant a new trial after the expiration of the term. *Baldwin* v. *Kraemer*, 2 Cal. 583.

11. A stipulation to refer the whole matter is a waiver of any objection that the motion for a new trial and to set aside the award was not made in statute time. *Heslep* v. *City of San Francisco*, 4 Cal. 2.

12. Errors in law, occurring in the court below, will be reviewed in the supreme court, although a new trial was not asked. *Brown* v. *Tolles*, 7 Cal. 399; *Rice* v. *Gashirie*, 13 Cal. 54.

13. A party should appeal, if aggrieved, from an order granting a new trial during the time allowed by the statute, and cannot, after taking his chances upon a second trial, rely on this fact as error. *Brown* v. *Tolles*, 7 Cal. 399.

*This provision does not exist in the code of April 29th, 1851.

14. The party in whose favor a judgment is rendered on a special verdict, must move for a new trial if he is not satisfied with the verdict, as the latter must otherwise be conclusive upon the facts in the appellate court. *Garwood* v. *Simpson*, 8 Cal. 108.

15. On appeal from a justice's court to a county court, on questions of law alone, if a new trial be ordered it should take place in the county court. *People* v. *Freelon*, 8 Cal. 518.

16. After appealing from a judgment alone, a party may appeal from an order overruling a motion for a new trial in the same case, provided the latter appeal is taken in time. *Marziou* v. *Pioche*, 8 Cal. 537.

17. A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by defendants in a new trial. *Turner* v. *McIlhaney*, 8 Cal. 579.

18. Where, pending a motion for a new trial in the district court, the defendants violate an injunction previously issued by said district court, the supreme court will issue a mandamus against the judge of such district court to compel him to issue his attachment for contempt. *Ortman* v. *Dixon*, 9 Cal. 24.

19. The appellate power of the supreme court over the county court could not be properly or efficiently exercised unless the power to grant a new trial existed in the county court. The county court certainly has power to grant a new trial. *Dickenson* v. *Van Horn*, 9 Cal. 211.

20. If any errors intervened on the trial of a cause, an order of the court below, granting a new trial, ought not to be disturbed. *Hastings* v. *Steamer Uncle Sam*, 10 Cal. 341.

21. Where an appeal is taken in the same notice, both from a final judgment and an order refusing a new trial, and it appears that sixty days from the entry of the order for a new trial have elapsed, the appeal, so far as the order is concerned, will on motion be dismissed. *Lower* v. *Knox*, 10 Cal. 481.

22. Where the facts show that the action of the court below approached nearly to an arbitrary exercise of its discretion, that action will not be reviewed unless there has been a motion for a new trial. *Pilot Rock Creek Canal Co.* v. *Chapman*, 11 Cal. 162.

23. Where the parties in the court below stipulated that a motion for a new trial should be denied, they cannot question in this court the correctness of an order denying such motion. *Brotherton* v. *Hart*, 11 Cal. 405.

24. The fact that instructions given by the court are lost or mislaid before a motion for new trial is heard is no ground to suspend the hearing of the motion or for a new trial. *Vischer* v. *Webster*, 13 Cal. 60.

25. A stipulation to the effect that a statement may "be used on the motion for new trial in this cause, and also on the appeal to the supreme court," includes an appeal from the judgment as well as an appeal upon the decision of the motion for a new trial. *Hastings* v. *Halleck*, 13 Cal. 207.

26. Where a party moves for a new trial and fails, he cannot, on the same facts, go into equity to enjoin the judgment rendered. *Collins* v. *Butler*, 14 Cal. 226.

27. On motion for new trial, it is irregular for the court to reverse its first judgment, and render a contrary one, without hearing or notice. *Mitchell* v. *Hackett*, 14 Cal. 667.

28. A party cannot appeal from an order overruling a motion for a new trial, when he fails to prosecute his motion before the district court, especially when the case involved complicated facts, and was not tried by the judge by whom the alleged errors were committed. The failure to prosecute in such a case is an abandonment of the motion. *Mahoney* v. *Wilson*, 15 Cal. 43; *Frank* v. *Doane*, 15 Cal. 303; *Green* v. *Doane*, 15 Cal. 304.

29. The court below may refuse a new trial, even though both parties consent to it. Where a case has been once fully tried, parties have not an arbitrary discretion to renew the litigation. *Phelan* v. *Ruiz*, 15 Cal. 90.

II. Grounds of the Motion for New Trial.

30. Where from the record it appears highly probable that the judgment of the court below is founded neither upon law or equity, the supreme court should reverse the judgment or grant a new trial. *Reed* v. *Jourdain*, 1 Cal. 102.

31. Where a judgment is rendered at 9 A. M. upon a summons citing defendant to answer at 10 A. M.: held, that the judgment is irregular, and a new trial will be ordered. *Parker* v. *Shephard*, 1 Cal. 132.

32. A new trial will not be granted where the evidence shows that a case cannot be made out, and it would consequently be a useless expense. *Suñol* v. *Hepburn*, 1 Cal. 285.

33. A new trial will be ordered, although a verdict may be excessive, if the court is satisfied that an improper charge was given to the jury, and the fact that it had no effect upon them does not clearly appear. *Yonge* v. *Pacific Mail S. S. Co.*, 1 Cal. 354.

34. Whether driving piles in a street extended into the bay of San Francisco is an obstruction to the free use of the street by the public, is a question for the jury to pass upon, and if not so submitted, a new trial will be granted. *City of San Francisco* v. *Clark*, 1 Cal. 386.

35. A new trial should not be granted on the affidavit of a juryman, made after the verdict, and for the purpose of moving for a new trial, that he had formed and expressed an opinion before the trial. *People* v. *Baker*, 1 Cal. 405.

36. A new trial will be granted when the court is satisfied that the jury were misdirected in the charge, and that thereupon founded their verdict. *Gunter* v. *Geary*, 1 Cal. 468.

37. The whole charge to the jury should be taken together, and when considered, if it appear that the jury could not have been misled by it, a new trial will not be granted. *Carrington* v. *Pacific Mail S. S. Co.*, 1 Cal. 478.

38. A new trial will not be granted for an error by which the rights of the party were not prejudiced. *Kilburn* v. *Ritchie*, 2 Cal. 148.

39. The appellate court will not disturb the order of an inferior court in granting or refusing a new trial unless manifest error shall appear. *Bartlett* v. *Hogden*, 3 Cal. 58; *Watson* v. *McClay*, 4 Cal. 288.

40. A new trial will be ordered where there is such irregularity in the proceedings that the ends of justice will be better subserved. *Sannickson* v. *Brown*, 5 Cal. 58.

41. It is a proper exercise of power in a court to grant a new trial on the ground of excessive damages, when the verdict is grossly inconsistent in its relation of the facts. *Potter* v. *Seale*, 5 Cal. 411.

42. A party cannot take his chances for a verdict on instructions given or refused without exception taken, and then after verdict except to the action of the court upon motion for a new trial. *Letter* v. *Putney*, 7 Cal. 423.

43. There having been no motion for a new trial, the supreme court cannot go behind the facts as found in the court below. *White* v. *Clark*, 8 Cal. 514; *Marziou* v. *Pioche*, 8 Cal. 537.

44. Where a party appears and argues a motion for a new trial, he cannot afterwards object that the statement was not agreed to by him, and that it was not settled by the judge. *Dickenson* v. *Van Horn*, 9 Cal. 211.

45. In a statement for a new trial, the evidence may be simply referred to, and need not be set out in the statement itself. *Ib.*

46. A failure to file a statement, setting forth the grounds upon which a party intends to rely, on motion for a new trial, operates as a waiver of the right to the motion. *Wing* v. *Owen*, 9 Cal. 247.

47. Where the statement embodied in the record is filed on a motion for a new trial, the appellate court will only examine the action of the court below in denying the motion, nor will it allow objections to an order entered in the court below by consent of parties. *Meerholz* v. *Sessions*, 9 Cal. 277; *Lower* v. *Knox*, 10 Cal. 481; *Brotherton* v. *Hart*, 11 Cal. 405.

48. Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all ground of error based on the affidavits; but the omission does not affect his right to raise the question as to errors apparent on the face of the record. *Branger* v. *Chevalier*, 9 Cal. 362.

49. Where the statement on motion for a new trial is not filed within the time prescribed by law, this court will only look to the judgment roll. *Lafferty* v. *Brownlee*, 11 Cal. 132.

50. Where there are no grounds or reasons stated on motions for nonsuit and new trial, and no exceptions taken to instructions of the court, errors cannot be assigned. *Holverstot* v. *Bugby*, 13 Cal. 44.

51. Where no motion for a new trial is made, the finding of facts by the court below is conclusive. *Rhine* v. *Bogardus*, 13 Cal. 74.

52. If, after verdict, no motion be made for a new trial, the supreme court will not review the testimony. *Liening* v. *Gould*, 13 Cal. 599.

53. Where instructions to the jury are not excepted to at the time they are given or refused, and a motion for new trial is made for error in giving and refusing such instructions, they cannot be considered on appeal from the order denying the motion. *Collier* v. *Corbett*, 15 Cal. 186.

54. Where a motion for a new trial is denied, and the record contains the statement used on such motion, but no statement on appeal from the judgment, this court can only examine the action of the court below in denying the motion—the judgment cannot be reviewed, except through the order made upon the motion, and from this order, no appeal having been taken, the case stands on the judgment roll. *Burdge* v. *Gold Hill and Bear River W. & M. Co.*, 15 Cal. 198.

55. Where the record shows simply a statement signed by the district judge, without any certificate preceding as to the correctness of the statement, and it does not purport to be a statement on motion for new trial, and no order appears disposing of the motion for new trial: held, that there is no statement on motion for new trial or on appeal. And the grounds of the motion for new trial not being filed within the time required by law, the appeal is from the judgment alone. *Mc Cartney* v. *Fitz Henry*, 16 Cal. 185.

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1. *Insufficiency or Errors of Evidence.*

56. Unless the illegal testimony could have had no influence upon the verdict, and the presumption is that it did, a new trial should be granted. *Santillan* v. *Moses*, 1 Cal. 93.

57. A new trial will be granted if improper evidence went to the jury, and the court cannot clearly see that it had no effect or weight upon the jury. *Mateer* v. *Brown*, 1 Cal. 224.

58. A new trial will be ordered when, on account of the imperfections of the record returned, the appellate court could not see the true state of facts given in evidence. *Moore* v. *Reynolds*, 1 Cal. 353.

59. Where improper evidence is submitted to the jury, under objection, a new trial will be granted on appeal unless the court can see that such evidence could not possibly have had an effect upon the jury prejudicial to the appellant. *Innis* v. *Steamer Senator*, 1 Cal. 462.

60. The appellate court will decline to review the facts of the case, unless an assignment of errors shows that the court below refused an application for a new trial, made on the ground that the verdict was contrary to evidence, and that only as an appeal from the refusal to grant a new trial. *Smith* v. *Phelps*, 2 Cal. 121; *Griswold* v. *Sharpe*, 2 Cal. 23; *Brown* v. *Graves*, 2 Cal. 119; *Ingraham* v. *Gildermeester*, 2 Cal. 484; *Whitman* v. *Sutter*, 3 Cal. 179; *Brown* v. *Tolles*, 7 Cal. 399; *Garwood* v. *Simpson*, 8 Cal. 108; *Marziou* v. *Pioche*, 8 Cal. 537; *Liening* v. *Gould*, 13 Cal. 599; *Duff* v. *Fisher*, 15 Cal. 380.

61. A new trial will be granted when the verdict is contrary to law and evidence. *People* v. *Martin*, 2 Cal. 484.

62. Where no motion for a new trial is made, the appellate court cannot examine the evidence to see whether it warrants the finding. *Covillaud* v. *Tanner*, 7 Cal. 39; *Brown* v. *Tolles*, 7 Cal. 399.

63. Where the verdict of the jury is clearly against the evidence, a new trial will be awarded. *Bagley* v. *Eaton*, 8 Cal. 164; *Potter* v. *Carney*, 8 Cal. 574.

64. When the evidence is not set out in a statement on appeal, the supreme court will presume that the court below had good reason for granting a new trial. *Dickenson* v. *Van Horn*, 9 Cal. 211.

65. Where the motion for new trial, though made, does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict. *Myers* v. *Casey*, 14 Cal. 543.

66. Where there is some evidence to support a verdict, and a motion for a new trial is overruled, the supreme court will not interfere. *Baxter* v. *McKinlay*, 16 Cal. 76.

67. On motion for a new trial, on the sole ground that the verdict is not sustained by the evidence, the court below, in passing on the motion, cannot disregard any

portion of the evidence before the jury. The question as to the competency of the evidence cannot be raised on such motion. *Mc Cloud* v. *O'Neal*, 16 Cal. 397.

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2. *Newly Discovered Evidence.*

68. On motion for a new trial on the ground of newly discovered evidence, that evidence should be fully set forth or the motion will be denied. *Perry* v. *Cochran*, 1 Cal. 180.

69. A party ought not to rely upon his his own single and unsupported statement, on a motion for a new trial, of the newly discovered evidence, but should if possible procure the affidavits of the persons whose testimony he deems material, so that the court may be satisfied as to what facts he will testify. *Rogers* v. *Huie*, 1 Cal. 433.

70. An application for a new trial on the ground of newly discovered evidence must show affirmatively that the evidence is new, material and not cumulative; that the applicant has used due diligence in preparing his case for trial, and that the new evidence was discovered after the trial, and will be important, and tend to prove facts which were not distinctly in issue on the trial, or were not then known or investigated by proof. *Bartlett* v. *Hogdon*, 3 Cal. 57; *Brooks* v. *Lyon*, 3 Cal. 114; *Burritt* v. *Gibson*, 3 Cal. 399.

71. Where the report of a referee disclosed doubt in his conclusions and acts, and before the report as made up was filed, the defendant applied for leave to introduce newly discovered evidence, which was refused from a doubt as to his power, though he reported to the court that such evidence, if given, would probably cause a different result; held, that a new trial should have been had. *Hoyt* v. *Saunders*, 4 Cal. 347.

72. A new trial on the ground of newly discovered evidence should not have been granted where such evidence is merely cumulative, and is that of a witness whose deposition was used on the trial, and particularly where the verdict shows he was not believed at first. *Gaven* v. *Dopman*, 5 Cal. 342.

73. In cases of conflicting testimony, newly discovered evidence merely cumulative is no ground for a new trial. *Taylor* v. *California Stage Co.*, 6 Cal. 230.

74. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative and going to contradict the witnesses of the other party. *Live Yankee Co.* v. *Oregon Co.*, 7 Cal. 42.

75. It is not good ground for a new trial that the defendant discovered material testimony at too late a period to produce the same at the trial. It would, however, be good ground on which to base a motion for continuance. *Berry* v. *Metzler*, 7 Cal. 418.

76. A new trial will not be granted on the ground of newly discovered evidence, which is alleged to be a deed recorded in the county recorder's office a year before the trial, and a record of a judgment in the same court in which the cause was tried. *Weimer* v. *Lowery*, 11 Cal. 113.

77. On a motion for a new trial on the ground of newly discovered evidence, the affidavit of one of the defendants as to what an absent witness will testify is insufficient. It should be accompanied by an affidavit of the witness himself, or time should be applied to get it, or its absence accounted for. *Pilot Rock Creek Canal Co.* v. *Chapman*, 11 Cal. 162; *Jenny Lind Co.* v. *Bower*, 11 Cal. 199.

78. Motions for new trial on the ground of newly discovered evidence regarded with distrust and disfavor, and the strictest showing of diligence and all other facts necessary is required. This is especially true when the new testimony is to impeach a witness on the trial, or is merely cumulative. The party must show by his own affidavit that he did not know of this evidence, and could not by due diligence have obtained it; the affidavit of a witness is not sufficient. (In this case the party himself was present.) *Baker* v. *Joseph*, 16 Cal. 180.

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3. *Conflicting Evidence.*

79. The verdict of a jury should not be disturbed and a new trial granted, when rendered upon a question of fact, where the evidence is conflicting, and where no rule of law appears to have been violated. *Johnson* v. *Pendleton*, 1 Cal. 133: *Hoppe* v. *Robb*, 1 Cal. 373; *Vogan* v. *Barrier*, 1

Cal. 187; *Dwinelle* v. *Henriquez*, 1 Cal. 389; *Griswold* v. *Sharpe*, 2 Cal. 23; *Taylor* v. *McKinlay*, 4 Cal. 104; *Duell* v. *Bear River and Auburn W. & M. Co.*, 5 Cal. 86; *Conroy* v. *Flint*, 5 Cal. 329; *White* v. *Todds' Valley Water Co.*, 8 Cal. 444; *Scannell* v. *Strahl*, 9 Cal. 177; *Weddle* v. *Stark*, 10 Cal. 303; *Bensley* v. *Atwill*, 12 Cal. 240; *Ritter* v. *Stock*, 12 Cal. 402; *McGarrity* v. *Byington*, 12 Cal. 432; *Visher* v. *Webster*, 13 Cal. 60; *Stevens* v. *Irwin*, 15 Cal. 504.

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3. *Surprise.*

80. On a motion for a new trial on the ground of surprise at a trial, by the non-attendance of witnesses, the affidavit should show that reasonable diligence had been used in endeavoring to procure the attendance of the witnesses, and should set forth particularly and distinctly, the facts which the party expects to prove by the witnesses. *Rogers* v. *Huie*, 1 Cal. 432.

81. Where a slight degree of prudence would guard against surprise, it is not sufficient ground to allege for a new trial. *Brooks* v. *Lyon*, 3 Cal. 113.

82. Where one party to an action is misled by the act of the other, justice demands that a new trial should be granted. *Pinkham* v. *McFarland*, 5 Cal. 138.

83. Surprise at the testimony of a witness called by the adverse party, is no ground for a new trial, it not appearing that the party against whom the testimony was given had been misled by previous statements of the witness as to what he would testify. *Taylor* v. *California Stage Co.* 6 Cal. 230.

84. The mistake of counsel as to the competency of a witness, is no ground for granting a new trial. *Packer* v. *Heaton*, 9 Cal. 571.

85. Surprise at the ruling of the court on the trial, as to the admission of testimony, is not a ground for a new trial. *Fuller* v. *Hutchings*, 10 Cal. 526.

86. A party who is unprepared for trial at the time of the calling of the case, should move for a continuance; and if he fails to do this he waives his want of preparation and cannot afterwards, when judgment has gone against him, move for a new trial on this ground. *Turner* v. *Morrison*, 11 Cal. 21.

87. It is not sufficient for a new trial to aver that the party thus represented was ignorant at the time of the trial of the facts. He must show that he could not with the use of due diligence unmixed with any negligence on his part, have made himself acquainted with or ascertained the existence of the facts. *Williams* v. *Price*, 11 Cal. 213.

88. A new trial will not be granted on the affidavit of the attorney of record, that he as well as his client and witnesses were absent on the trial of the case because of a verbal agreement by opposing counsel to give notice of a day of trial, when such affidavit is met by counter affidavits by the opposing counsel, and when an attorney did appear and contest the case on the trial. *McDonald* v. *Bear River and Auburn W. & M. Co.*, 13 Cal. 230.

89. Complaint avers in substance that defendant made his note, etc., setting out a copy, that plaintiff is holder by transfer from the payee, etc., and that defendant is indebted to plaintiff thereon in the sum, etc. The complaint then avers: Plaintiff further shows that after said note was executed, etc., * * * defendant by virtue of * * * proceedings in insolvency, etc., * * * claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows that after said discharge as aforesaid, on or about * * * defendant promised" the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby revived said obligation, etc. Plaintiff herein having rested his case upon proving his note, and defendant not introducing any proof of his discharge in insolvency, the court below instructed the jury to find for plaintiff, and afterwards set aside the verdict and granted a new trial: held, that this court will not revise the discretion of the court below in granting the new trial; that defendant might well have been taken by surprise, and supposed it unnecessary to introduce proof of his discharge. *Smith* v. *Richmond*, 15 Cal. 502.

90. Where in suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answe denies such title, plaintiff must prove his

title as averred, at least in substance, and he cannot, against defendant's objection, recover on another and different title. And where, in such case, plaintiffs were permitted to prove and recover on a title other than the one so set up, it was error in the Court below to refuse a new trial, the motion for which was based on an affidavit of defendant that he was taken by surprise arising out of the frame of the pleadings, and that he could have rebutted plaintiff's case but for this surprise. *Eagan* v. *Delaney*, 16 Cal. 87.

III. When a New Trial in not Necessary.

91. An appeal may be taken from a judgment of the district court without moving for a new trial.* *Innis* v. *Steamer Senator*, 1 Cal. 459.

92. The granting a nonsuit on the facts, is a question of law, and if the proper exception be taken, may be reviewed on appeal without motion for a new trial. *Cravens* v. *Dewey*, 13 Cal. 42; *Darst* v. *Rush*, 14 Cal. 83.

93. For error of law excepted to, an appeal lies without motion for new trial. *Rice* v. *Gashirie*, 13 Cal. 55.

94. A special verdict settles the facts, and the court, by its judgment, pronounces the conclusions of law upon the facts found. If the court errs in this respect, the error may be reviewed without any motion for new trial; but the right to correct the verdict does not depend upon the judgment, and the steps necessary for the purpose must be taken within the statutory time. *People* v. *Hill*, 16 Cal. 117.

1. *In Equity Cases.*

95. Where, in a court below, an erroneous judgment has been entered in favor of a plaintiff, on a report of a referee, and the court erroneously sets aside the report and grants a new trial, from which action of the court the plaintiff appeals, the supreme court in a chancery case will correct both errors at the same time. *Grayson* v. *Guild*, 4 Cal. 124.

96. Where, in chancery cases, certain issues of fact are submitted to, and determined by a jury, the granting of a new trial is entirely discretionary with the chancellor, and his action is not revisable. *Gray* v. *Eaton*, 5 Cal. 448.

97. In equity cases, although no motion for a new trial is made, the supreme court will not hold the finding of facts by the court below conclusive. *Dewey* v. *Bowman*, 8 Cal. 148.

98. An appeal lies from an order setting aside a final decree in equity, and granting a rehearing, as it is in effect granting a new trial. *Riddle* v. *Baker*, 13 Cal. 302.

99. A rule of the district court requiring a party on motion for new trial or for judgment on a special verdict, to prepare and submit a statement of the evidence at the trial, does not apply to issues submitted to a jury in a chancery case. *Purcell* v. *McKune*, 14 Cal. 232.

100. A refusal to grant a new trial is no ground of error, particularly in an equity case where there may have been no necessity for a new trial, as upon application to the court upon the pleadings and facts before it, the proper decree might have been rendered, notwithstanding the verdict, or if refused, the error corrected by appeal. *Phelan* v. *Ruiz*, 15 Cal. 90.

IV. In Criminal Cases.

101. In cases of felony the prisoner must be present during the whole of his trial, and where depositions are read to the jury during his absence, a new trial will be granted. *People* v. *Kohler*, 5 Cal. 72.

102. The supreme court will not review in criminal cases, an order refusing a new trial, moved on the ground that the verdict is against evidence, unless the record contains a statement setting forth all the material portions of the testimony. *People* v. *York*, 9 Cal. 422.

103. When it is manifest from the testimony stated in the record, that the verdict of the jury must have been given under a state of great excitement, preventing a fair and just trial, and the court below has refused a new trial, this court will reverse the judgment and order a new trial. *People* v. *Acosta*, 10 Cal. 196.

104. In a criminal case, if the court below impose upon counsel against their

* This decision was made under the code of 1850, which provision is repealed by the code of April 29, 1851.

consent, a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel, that the prisoner was deprived by the limitation of the opportunity of a full defense, for this is his constitutional right, without which he cannot be lawfully convicted. *People* v. *Keenan*, 13 Cal. 584.

105. In criminal cases, on motion for a new trial, the prisoner may bring up any ruling of the court which denies him the benefit of a statutory privilege, as a written charge to the jury. *People* v. *Ah Fong*, 12 Cal. 348.

V. Notice of Motion for New Trial.

106. A motion for a new trial must be made within the time allowed by statute, unless there be circumstances which take the case out of the general rule. *Elliott* v. *Osborne*, 1 Cal. 396; *Dennison* v. *Smith*, 1 Cal. 437.

107. An injunction order restrains the acts of the party, but it does not stay the running of time, and the effect of it cannot be to postpone the statutory time required in giving notice of a motion for a new trial. *Elliott* v. *Osborne*, 1 Cal. 397.

108. A motion for a new trial, filed within the time allowed by law, stays the operation of the judgment, and preserves all rights until the same can be heard and determined, and is not affected by the adjournment of the court for the term. *Lurvey* v. *Wells*, 4 Cal. 106.

109. An appeal from an order granting a new trial, to be effectual, must be taken within the time allowed by statute. *Brown* v. *Tolles*, 7 Cal. 399.

110. A notice of motion for a new trial, unaccompanied by the affidavit required by statute, will not entitle the statement of the grounds of the motion to be considered on appeal. *Adams* v. *City of Oakland*, 8 Cal. 510.

111. On a motion for a new trial, the filing of a counter statement is a waiver of objections to want of notice of the intention to move for a new trial. *Williams* v. *Gregory*, 9 Cal. 76.

112. A party failing to give notice in time, of his intention to move for a new trial, or file his statement in time, waives his right to move for a new trial. *Caney* v. *Silverthorne*, 9 Cal. 68.

113. Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all ground of error based on the affidavits. *Branger* v. *Chevalier*, 9 Cal. 362.

114. The granting of a nonsuit on the facts, is a question of law, and if the proper exceptions be taken, may be reviewed on appeal, without motion for a new trial. *Cravens* v. *Dewey*, 13 Cal. 42.

115. Notice of motion for new trial given one day before judgment rendered, and six days after filing the report of the referee to whom the case had been sent to find the facts, is ineffectual for any purpose. If the trial terminated with the filing of the report, the notice was not in time; if it continued, in contemplation of law, until the entry of judgment, the notice was premature, and the proceedings on the motion void. *Mahoney* v. *Caperton*, 15 Cal. 314.

116. Moving for new trial does not of itself operate to extend the time for filing a statement on appeal from the judgment. And where judgment was rendered July 27th, 1859, and motion for new trial overruled October 22d, 1859, a statement on appeal served November 10th, 1859, was not in time. *Ib.*

117. On the rendition of a special verdict the trial is terminated, and notice of motion for new trial must be given within two days thereafter, or the proceedings based upon such notice will be disregarded. *People* v. *Hill*, 16 Cal. 117.

VI. Terms on Granting a New Trial.

118. When a new trial was to be had on payment of costs: held, that the acceptance of costs did not waive the right to appeal from the order granting a new trial. *Tyson* v. *Wells*, 1 Cal. 378.

119. Where, on appeal, the complaint is so radically defective, as not to authorize a judgment, a new trial may be granted, with leave to amend upon just terms. *Sterling* v. *Hanson*, 1 Cal. 480.

120. The court may impose terms in granting or refusing a new trial, and in the use of sound and admitted discre-

tion, may require a remittitur of a portion of an excessive judgment, or grant a motion for a new trial. *Benedict* v. *Cozzens*, 4 Cal. 382.

121. The district courts have power to impose terms to the granting of new trials in proper cases and where a party complies with the terms imposed, and avails himself of the advantage of the order, he cannot afterwards question its correctness. *Battelle* v. *Connor*, 6 Cal. 141.

122. It is not error in the court below to refuse a new trial, provided the successful party will consent to a reduction of his judgment. *Chapin* v. *Bourne*, 8 Cal. 296.

123. The terms of a new trial are peculiarly within the discretion of the court, with the exercise of which, the appellate court will not interfere except upon a clear showing of abuse, or grossly unreasonable terms. *Rice* v. *Gashirie*, 13 Cal. 55.

For statement on new trial, see STATEMENT.

NEWLY DISCOVERED EVIDENCE.

See EVIDENCE, XXI; NEW TRIAL, II, 2.

NONJOINDER.

1. Where it appears by the plaintiff's testimony that there is a nonjoinder of persons who should have been made plaintiffs, and a motion for a nonsuit is made on this ground, the court may permit an amendment by adding the name of a coplaintiff on such terms as may be just. *Acquital* v. *Crowell*, 1 Cal. 192.

2. If the plaintiff relies upon the contract made with several parties, they must be all joined in the action, unless there be an entirely new contract substituted, even when several parties have been treated as separate individuals in the transaction. *Mc Gilvery* v. *Morehead*, 3 Cal. 270.

3. A defendant cannot object to nonjoinder of another person as coplaintiff, after forcing the plaintiff to amend by omitting him. *Powell* v. *Ross*, 4 Cal. 198.

4. The objection that there is a nonjoinder of parties comes too late on appeal; it should have been taken advantage of by demurrer. *Beard* v. *Knox*, 5 Cal. 252.

5. Where the plaintiff had no knowledge until the trial, that a third party was a secret partner of the defendant, the nonjoinder of such third party cannot be objected to by the defendant. *Tomlinson* v. *Spencer*, 5 Cal. 293.

6. Where a defect of parties appears upon the face of the complaint, the objection must be taken advantage of by demurrer. *Andrews* v. *Mokelumne Hill Co.*, 7 Cal. 334.

7. All the parties in interest should join in an action of trover, and a failure to join may be pleaded in abatement. *Whitney* v. *Stark*, 8 Cal. 516.

See ACTIONS, JOINDER OF, MISJOINDER.

NONSUIT.

1. Courts have the power to order the plaintiff to submit to a compulsory nonsuit. *Ringgold* v. *Haven*, 1 Cal. 115.

2. Where there is no evidence upon some material point necessary to be proven in order to sustain the complaint, equally as where there is no evidence at all upon any point, it becomes the duty of the court, upon the motion of the defendant, to order a nonsuit. *Ringgold* v. *Haven*, 1 Cal. 116; *Dalrymple* v. *Hanson*, 1 Cal. 127; *Mateer* v. *Brown*, 1 Cal. 222.

3. The complaint contained averments against defendants as common carriers, and the action was for damages done to merchandise in its transportation: held, it was indispensable for the plaintiff to prove that the defendants were common carriers, and that the goods were delivered to and received by them as such for the purpose of being transported for hire. *Ringgold* v. *Haven*, 1 Cal. 116.

4. Where defendant moved for nonsuit,

and afterwards introduced evidence supplying the defect in the plaintiff's testimony on which the motion for nonsuit was founded: held, that the defendant waived his motion and could not insist upon it, on appeal. *Ringgold* v. *Haven*, 1 Cal. 117; *Smith* v. *Compton*, 6 Cal. 26; *Winans* v. *Hardenbergh*, 8 Cal. 293; *Perkins* v. *Thornburgh*, 10 Cal. 190.

5. Where it appears by the plaintiff's testimony that there is a nonjoinder of persons who should have been made plaintiffs, and a motion for a nonsuit is made on this ground, the court may permit an amendment by adding the name of a coplaintiff on such terms as may be just. *Acquital* v. *Crowell*, 1 Cal. 192.

6. A party making a motion for a nonsuit on one ground, impliedly waives all others and cannot avail himself of a different position on appeal from that assumed in the court below. *Mateer* v. *Brown*, 1 Cal. 222.

7. If the evidence given by the plaintiff would not authorize a jury to find a verdict for him, or if the court would set it aside if so found, as contrary to evidence, in such case it is the duty of the court to grant a nonsuit. *Ib.*

8. If the statement does not explicitly state the particular ground of granting the nonsuit, yet if it be a necessary inference from what is disclosed, it is sufficient for the action of the appellate court, and it will be reversed if erroneous. *Morgan* v. *Thrift*, 2 Cal. 563.

9. Where the plaintiff fails to appear and prosecute his suit and the defendant moves a nonsuit, the court has no alternative but to grant it. *Peralta* v. *Mariea*, 3 Cal. 187.

10. Where the evidence and the reasonable presumption tend to establish the fact in controversy, a nonsuit is improper. The case should be given to the jury. *DeRo* v. *Cordes*, 4 Cal. 119.

11. Where an action was decided by the supreme court, and judgment reversed upon the ground that defendants erroneously were not allowed to show the unsoundness of the article sued for, a nonsuit would not be proper on the second trial, if the defendants claimed the value for so much of the article delivered before the contract was rescinded. *Ruiz* v. *Norton*, 4 Cal. 361.

12. Costs, by way of indemnity, ought not to be taxed in case of a nonsuit. *Rice* v. *Leonard*, 5 Cal. 61.

13. Where one party to an action is misled by the act of the other, whereby a nonsuit is taken, justice demands a new trial should be granted. *Pinkham* v. *McFarland*, 5 Cal. 138.

14. The liability of a guarantor on a promissory note is strictly that of an endorser, and unless there is proof of notice of protest, a nonsuit will be granted. *Pierce* v. *Kennedy*, 5 Cal. 139.

15. In an action against a ferryman, it was no error to allow the plaintiff to introduce the ferry license, after a motion for nonsuit, as this is a matter within the discretion of the court. *May* v. *Hanson*, 5 Cal. 365.

16. A court may in its discretion allow a plaintiff, after defendants have closed their case, and before the case is submitted, to supply an omission in the testimony occasioned by mistake or inadvertence, nor is such action any ground of reversal, unless it appear that injustice has been done by an abuse of discretion. *Priest* v. *Union Canal Co.*, 6 Cal. 171.

17. An appeal does not lie in favor of the plaintiff in an action, from a judgment of nonsuit, entered on his own motion. *Imley* v. *Beard*, 6 Cal. 666.

18. Mere surprise at the evidence given by the witnesses of the defendant, is not sufficient ground for granting the plaintiff a new trial. He should submit to a nonsuit, and not take his chances for a verdict. *Live Yankee Co.* v. *Oregon Co.*, 7 Cal. 42.

19. After the motion for a nonsuit, the court may upon terms allow an amendment of the complaint, if it would not operate as a surprise upon the defendant, but if this is not done the plaintiff cannot recover. *Farmer* v. *Cram*, 7 Cal. 136.

20. A failure on the part of a plaintiff to make out his case, and error in the court in refusing to instruct the jury as in case of nonsuit, can be cured by the testimony of the defense. *Winans* v. *Hardenbergh*, 8 Cal. 293.

21. It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner* v. *Marshall*, 9 Cal. 270.

22. Where a motion is made for a nonsuit, without stating the grounds upon

which it is made, it is not error to overrule the motion. *Kiler* v. *Kimball*, 10 Cal. 268.

23. The grounds of a motion for a nonsuit must appear in the record, otherwise this court will not consider such motion. *Mc Garrity* v. *Byington*, 12 Cal. 429.

24. The granting of a nonsuit on the facts is a question of law, and if the proper exceptions be taken may be reviewed on appeal without motion for new trial. *Cravens* v. *Dewey*, 13 Cal. 42; *Darst* v. *Rush*, 14 Cal. 83.

25. Nonsuit is not proper where there is any evidence tending to prove the case. *Cravens* v. *Dewey*, 13 Cal. 42.

26. Where no grounds or reasons are stated on motion for nonsuit and new trial, and no exceptions taken to instructions of the court, errors cannot be assigned. *Holverstot* v. *Bugby*, 13 Cal. 44.

27. As a nonsuit determines nothing, the plaintiff may proceed and under better proof, if he can procure it, try his case anew. *Wilson* v. *Corbier*, 13 Cal. 168.

28. The question of misjoinder or want of common interest in the subject of the suit, should, if it appeared by the plaintiff's evidence, have been taken advantage of by motion for nonsuit or upon instructions. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 13 Cal. 238.

29. Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counter claim, nor is he bound to tender costs before nonsuit. *Hancock Ditch Co.* v. *Bradford*, 13 Cal. 637.

30. Where plaintiffs having excepted to the ruling of the court, excluding certain evidence, take, in consequence of such ruling, a nonsuit, with leave to move to set it aside, they do not waive any of their rights as to the exception taken. *Natoma W. and M. Co.* v. *Clarkin*, 14 Cal. 549.

31. In ejectment upon a disclaimer of possession or interest in the property, a judgment for plaintiff cannot be entered. When such disclaimer is relied upon, the only proper judgment is one of nonsuit. *Noe* v. *Card*, 14 Cal. 609.

32. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third persons, whether the agent had any written authority or not; and where proof was admitted, without objection, of the acts of the agent in renting and controlling the property for the principal, defendant cannot afterwards claim a nonsuit on the general ground that no power of attorney from the principal was shown, and that, therefore, his possession was not sufficiently proven. *Minturn* v. *Burr*, 16 Cal. 109.

33. It cannot be assigned for error in the supreme court, that the court below refused a nonsuit because of no demand made before suit, unless that ground of nonsuit was taken below. *Baker* v. *Joseph*, 16 Cal. 180.

34. Where, in ejectment, plaintiffs, husband and wife, introduced in evidence a patent to one Johnson, covering the premises, a deed from Johnson to one Robinson, and a deed from Robinson to the wife, reciting, as its consideration, one hundred dollars, proved defendant to be in possession and rested, and defendant moved for a nonsuit, on the ground that the evidence had not established any joint seizin or right of possession in plaintiffs, but had affirmatively established that there was no such joint seizin or right: held, that the nonsuit was properly denied; that the monied consideration recited in the deed to the wife raises the presumption that the property was common property, the entire management and control of which, with the absolute right of possession and disposition, were vested in the husband. *Mott* v. *Smith*, 16 Cal. 557.

NOTARY PUBLIC.

1. A certificate of a notary public that an affidavit was sworn to or affirmed and subscribed before him is regular, although his seal is not affixed. *Mills* v. *Dunlap*, 3 Cal. 97.

2. A notary public has no authority under the statutes of this State, to take depositions of witnesses in any action

pending within his own county; that power is delegated to commissioners.* *Mc Cann* v. *Beach*, 2 Cal. 33.

3. By the fifth section of the act concerning notaries public, notes are made protestable, and by the tenth section the protest of a notary is expressly made evidence of demand and nonpayment, of notes as well as of bills. *Connolly* v. *Goodwin*, 5 Cal. 221.

4. An instrument not under seal, is not the character of security which is required by the statute to be given by the notaries public. *Van de Casteele* v. *Cornwall*, 5 Cal. 426.

5. The governor of this State cannot remove from office a notary duly commissioned before his full term of office has expired. *People* v. *Jewett*, 6 Cal. 291.

6. A condition in a notary's bond that he shall well and truly discharge the duties of his office according to law, is the only proper condition to be inserted in his bond. *Tevis* v. *Randall*, 6 Cal. 635.

7. It is the duty of a notary public to give notice of protest to the endorsers of a promissory note protested by him. He is allowed by law a fee for so doing, and the recital of "notice given," in the protest, is made evidence of the fact. *Ib.*

8. The whole object of the record of a notary was to preserve in a permanent form the evidence of the protest, and notice by which the liabilities of parties had become fixed; and it could never have been intended that a certified copy of one-half of the record should be evidence, and not of the other half. *McFarland* v. *Pico*, 8 Cal. 635.

9. The statute of 1853 provides that a certificate from a notary's record shall be prima facie evidence of the facts therein contained. *Ib.* 636.

10. Where the condition of the bond of a notary public is that he will "well and truly perform and discharge the duties of a notary public, according to law": held, that this clause embraces every act which he is authorized or required by law to do by virtue of his office. *Fogarty* v. *Finlay*, 10 Cal. 244.

11. Where a notary did not faithfully perform his duty, but was guilty of gross and culpable negligence, he is responsible to the party injured for the damages resulting from his negligence. *Ib.* 245.

12. The purpose of a certificate of acknowledgment is to entitle the deed to be recorded and to be admitted in evidence without further proof. *Ib.*

13. If the notary read the certificate before signing it, an omission must have been known to him; if he did not read it, he is equally guilty of negligence. *Ib.*

14. A notary holds himself out to the world as a person competent to perform the business connected with the office, and he contracts with those who employ him that he will perform such duty with integrity, diligence and skill. *Ib.*

15. A party employing a notary is not obliged to determine upon the validity or legality of his acts. *Ib.* 246.

16. Where a mortgaged debt has been lost by such negligence of the notary, the measure of damages is the amount of the debt and interest to be secured by the mortgage. *Ib.*

17. The certificate of acknowledgment of a notary public to a deed is not an act in pais, which he may exercise by virtue of his office at any time while in office. *Bours* v. *Zachariah*, 11 Cal. 292.

18. After taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority. *Ib.* 293.

19. A notary derives his power to take and certify acknowledgments to deeds from the statute. He acts as under a special commission for that particular case—clothed with limited statutory power. He is to take an acknowledgment and certify it as part of the same transaction. After taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority and cannot alter or amend his certificate. *Ib.* 297.

20. A notarial certificate of protest of a note is of itself presumptive evidence that the notary had authority from the proper parties to make the protest. *Gillespie* v. *Neville*, 14 Cal. 409.

21. A certificate of acknowledgment to a deed, with the private seal of the notary, dated September 22, 1852, is good under the statute then in force. *Stark* v. *Barrett*, 15 Cal. 372.

22. Notice left by a notary at the residence of the endorser of a note—he being

* This power is delegated to notaries in the civil code of April 29, 1851.

absent at the time— describing the note, stating that it was protested by him for nonpayment, and that the holder looked to the endorser for payment, but not signed by any one, nor indicating in any way from whom it proceeded, is insufficient to charge the endorser. *Klockenbaum* v. *Pierson*, 16 Cal. 376.

23. Such notice having been so left on Saturday, the day the note matured, the record shows that on Monday, in a conversation between the endorser and the notary, "something was said about the note," and that the notary informed the endorser that plaintiff was "its owner and holder": held, that as a verbal notice, this conversation was insufficient; that a notice must inform the endorser, either expressly or by necessary implication, that the note has been duly presented at its maturity and discharged. *Ib.* 377.

24. Where a deed has attached to it certificates of acknowledgment, made at the Hawaiian Islands; the one by a person who describes himself, in the body of the certificate, as "the principal notary public" of the islands, and affixes to his signature a similar designation of his official character, with his notarial seal; and the other by a person who describes himself, in the body of the certificate, as "the vice consul of the United States of America, at Honolulu, Hawaiian Islands," and affixes to his signature the designation of his official character as "U. S. vice consul," and the consular seal: held, that the execution of the deed was prima facie sufficiently proved to be admitted in evidence against the objection that the persons before whom the acknowledgments purported to have been made were not shown to be the officers they represent themselves to be, and were not authorized to take the acknowledgments. *Mott* v. *Smith*, 16 Cal. 552.

25. The general designation, in the fourth section of the act of April 16th, 1850, as to conveyances, of any notary public, or any consul of the United States, embraces notaries and consuls of every grade— whether principal or inferior notary, or consul general or vice consul. *Ib.*

26. The certificate of a notary public or United States consul, of acknowledgment of a deed, is prima facie evidence of the official character of the person by whom it is given. *Ib.*

NOTICE.

1. A decision of the supreme court will be opened for failure of the appellant to appear if he had not actual notice, although a formal statutory notice is not necessary. *Lighstone* v. *Laurencel*, 2 Cal. 106.

2. A slight error in the title of a cause where there is no prior suit pending between the parties, will not invalidate a notice. *Mills* v. *Dunlap*, 3 Cal. 96.

3. The substitution of papers or pleadings is always within the discretion of the court, and no notice of the motion to apply for it need be given when the notice can be of no use. *Benedict* v. *Cozzens*, 4 Cal. 382.

4. Where the object of a notice of appeal is accomplished it is immaterial whether the notice be given or not; and where both parties appear, no notice whatever is necessary to be shown. *McLeran* v. *Shartzer*, 5 Cal. 70.

5. A judgment of dismissal in the county court, upon the ground that it did not appear that the defendants had notice of the trial in the court below, is erroneous and will be set aside. *Coyle* v. *Baldwin*, 5 Cal. 75,

6. Where a party changes his attorneys in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorneys of record. *Grant* v. *White*, 6 Cal. 55.

7. Notice of appeal from the judgment of a justice of the peace may be served on the attorney of the adverse party. *Welton* v. *Garibardi*, 6 Cal. 246; *Coulter* v. *Stark*, 7 Cal. 245.

8. Where the plaintiff in ejectment claimed under a subsequent deed from the grantor in the above instrument, and the defendants held under the grantees named therein: held, that the record of said instrument in the county recorder's office, made June 20th, 1850, imparted no notice to the plaintiff who purchased July 9th, 1855; the registration of executory contracts not being authorized or made notice by statute. *Mesick* v. *Sunderland*, 6 Cal. 315.

9. Transcripts used on appeal in the supreme court must show that a notice of of the appeal has been duly served upon

the other side. *Franklin* v. *Reiner*, 8 Cal. 340; *Hildreth* v. *Gwindon*, 10 Cal. 491.

10. The filing of a notice of appeal must precede the filing of the undertaking on appeal. *Buckholder* v. *Byers*, 10 Cal. 481.

11. The sufficiency of a notice to the adverse party to produce on trial a certain paper in his possession, is a question of discretion in the court trying the case. *Burke* v. *Table Mountain Water Co.*, 12 Cal. 407.

12. When the statute speaks of notice of motion, it means written notice, or notice in open court of which a minute is made by the court. *Borland* v. *Thornton*, 12 Cal. 448.

13. Where a rule of the district court requires three days written notice of exceptions to depositions, if they are returned and filed with the court that length of time before trial, and such notice is not given on a first trial, the depositions may be admitted on a second trial, though it took place the day after the first trial. The party was in default in not giving the notice before the first trial. *Myers* v. *Casey*, 14 Cal. 543.

14. Where the court makes an order requiring plaintiff to appear at a certain time and show cause why a judgment in his favor should not be set aside, and it does not appear that a copy of the order was served on plaintiff or his attorney, or that any notice was given of the time at which the matter was to be heard; it is error for the court to set aside the judgment, and its order to that effect will be reversed on appeal. *Vallejo* v. *Green*, 16 Cal. 161.

For notice of appeal see APPEAL, X.

For notice of protest see BILLS OF EXCHANGE, III.

See also PROTEST, REGISTRATION.

NOTICE TO QUIT.

1. A mere naked tresspasser without consideration under a mere permission and which has been revoked, is entitled to notice to quit or demand of possession before suit. *Godwin* v. *Stebbins*, 2 Cal. 105.

2. Notice to quit is not necessary where the relation of landlord and tenant does not exist. *Kilburn* v. *Ritchie*, 2 Cal. 148.

3. An objection to the sufficiency of a notice to quit should be first raised at nisi prius and not on appeal. *Castro* v *Gill*, 5 Cal. 42.

4. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance, on the first day of each month. November 1st, 1858, defendant, being in possession, denied plaintiff's title and refused to pay rent. December 23d, 1858, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment which was paid. January 8th, 1859, plaintiff served on defendant notice to quit on the ground of forfeiture for nonpayment of rent; defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers; denying, among other things, plaintiff's title and his own relation of tenant: held, that, plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith* v. *Ogg Shaw*, 16 Cal. 89; 92.

See EJECTMENT, LANDLORD AND TENANT, LEASE, RENT.

NUISANCE.

1. Any one has a right to abate a common nuisance which is an injury to the whole community, without regard to the question whether it is an immediate obstruction or injury to him. A private nuisance is one which only injures a particular individual or class of individuals, and can be abated only by him who suffers from it. *Gunter* v. *Geary*, 1 Cal. 466.

2. The fact whether a structure was a public nuisance is a question not for the court but for the jury to decide. *Ib.*

3. It is a public nuisance to erect a house in the highway. *Ib.* 468.

4. A house on fire, or those in its immediate vicinity which serve to communicate the flames, is a nuisance which it is lawful to abate, and the private rights of the individual yield to considerations of general convenience and the interest of society. *Surocco* v. *Geary*, 3 Cal. 73.

5. The constitutional provision which requires payment for private property taken for public use does not apply to the destruction of a house to check a conflagration, nor can he who abates this nuisance be made personally liable for trespass unless the act is done without actual or apparent necessity. *Ib.*

6. Where plaintiff's mining claim was overflowed by means of a dam erected by the defendants, the court ordered a reduction of the dam, so as to prevent the overflow, or if necessary its entire abatement. *Ramsay* v. *Chandler*, 3 Cal. 93.

7. To entitle a party to an injunction in case of a nuisance, the injury to be restrained must be irremediable, and such as cannot be adequately compensated by damages. *Middleton* v. *Franklin*, 3 Cal. 241.

8. The erection of a steam engine and machinery and a grist mill in the cellar, under an auction store, held not to be such an injury as to require a restraining power of the court, at least not until the question of nuisance or no nuisance should be determined by a jury, and even then the remedy at common law is adequate. *Ib.*

9. The district courts have constitutional jurisdiction of cases of nuisance. The grant of such jurisdiction by statute to the county courts cannot take away the constitutional jurisdiction of the district courts. *Fitzgerald* v. *Urton*, 4 Cal. 238.

10. In an action for nuisance or trespass, the defendant has no right to inquire into the good faith of the plaintiff's possession. *Eberhard* v. *Tuolumne Water Co.*, 4 Cal. 308.

11. In an action for damages on an undertaking, given on sueing out an injunction, the sureties cannot plead as a defense that the business enjoined was a nuisance. *Cunningham* v. *Breed*, 4 Cal. 385.

12. The term "special cases" in the constitution, does not include any class of cases for which the courts of general jurisdiction have always supplied a remedy, as in cases to abate a nuisance. *Parsons* v. *Tuolumne County Water Co.*, 5 Cal. 44.

13. The statute of this State, defining what are nuisances, and prescribing a remedy by action, does not take away any common law remedy in the abatement of nuisances, which the statute does not embrace. *Stiles* v. *Laird*, 5 Cal. 122.

14. In an action to abate a nuisance, damages are only an incident to the action, and the failure to recover them does not affect the question of costs. *Hudson* v. *Doyle*, 6 Cal. 102.

15. A person may construct or continue what would otherwise be an actionable nuisance, provided that at the commencement of it no person was in a condition to be injured by it, or in other words, that mere priority as between owners of the the soil gave a superior right. *Tenney* v. *Miners' Ditch Co.*, 7 Cal. 339.

16. The diversion of a water course is a private nuisance. *Tuolumne Water Co.* v. *Chapman*, 8 Cal. 397.

17. Actions for the diversion of the waters of ditches, are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Parke* v. *Kilham*, 8 Cal. 79.

18. In an action to abate a nuisance, caused by the running a ditch for the conveyance of water across the land of the plaintiff, the defendants set up in the answer that it was mineral land belonging to the United States, and that the ditch was for mining purposes, which allegations were stricken out on motion of plaintiff's attorney: held, that they were properly stricken out as irrelevant, for if true they constituted no defense to the action. *Weimer* v. *Lowery*, 11 Cal. 112.

19. Plaintiffs owned certain mining claims and quartz lode on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water on to plaintiff's claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz mill which they intended to construct: held, that the action was premature, and that the demurrer to the complaint on the

ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained. *Harvey* v. *Chilton*, 11 Cal. 120.

See ABATEMENT.

OAKLAND.

1. The act of May 4th, 1852, "to incorporate the town of Oakland," confers no power of taxation directly, but leave it to be derived from the general act of March 27th, 1850, under which the trustees of towns have power to levy and collect a tax annually, not exceeding fifty cents on every one hundred dollars of the assessed value of the property, and provided further that unpaid taxes should be recovered by a suit in the name of the corporation: held, that an assessment of two and three-fourths per cent. was wholly unauthorized by law, and void. *Hays* v. *Hogan*, 5 Cal. 242.

2. Under the act of 1852, incorporating the town of Oakland, the corporate and municipal powers were lodged in a board of trustees. The board had power to lay out, make, open, widen, regulate and keep in repair all streets, bridges, ferries etc., and to authorize the construction of the same. Under this clause the board by ordinance, gave defendant the exclusive privilege of laying out, establishing, constructing and regulating wharfs within the city for thirty-seven years: held, that the ordinance was void as being a transfer of the corporate powers of the board, and that the city can come into equity to have the ordinance declared void, and the wharfs held by defendants thereunder, delivered up. *City of Oakland* v. *Carpentier*, 13 Cal. 549.

OATH.

1. The administering of the oath as provided by the statute to a person who is challenged for not being a qualified voter, is a matter of discretion of the judges of the election. *People* v. *Gordon*, 5 Cal. 236.

2. When the judges have administered the oath, the right to vote is concluded, and it is error to deny it. *Ib.*

See AFFIDAVIT.

OCCUPATION.

See POSSESSION, USE AND OCCUPATION.

OFFICE.

1. A public officer who stands in the relation of agent of the government or of the public, is not personally liable upon contract made by him as such officer and within the scope of his legitimate duties. *Dwinelle* v. *Henriquez*, 1 Cal. 392.

2. But this reason does not apply when neither the government nor the public in any way can be considered or held responsible for a contract made by a person, although a public officer. *Ib.*

3. The neglect of an officer to perform a mere ministerial act, will not defeat an election where there was actual notice and no fraud or surprise. *People* v. *Campbell*, 2 Cal. 137.

4. The unconstitutionality of the statute empowering the governor to commission a person as judge of the supreme court during the temporary absence of one of its judges, fully discussed. *People* v. *Wells*, 2 Cal. 198; 610.

5. The neglect of the plaintiff to qualify for the office within the days stipulated in the municipal charter after his election, was a refusal on his part to serve, and vacated the office so far as he had any right thereto. *Payne* v. *City of San Francisco*, 3 Cal. 125.

6. To entitle a party to recover his salary for an office, it is incumbent on him to show not only that he performed the du-

ties of the office for the time alleged, but first, that he had been lawfully elected, and second, that he had qualified himself to hold the office by taking oath and filing his bond in the manner and at the time prescribed by law. *Ib.*

7. If an officer qualify before a person not lawfully qualified to administer the oath of office, it will be declared void. *Ib.* 127.

8. A resolution of a municipal body recognizing a party as street commissioner who has not lawfully qualified, will not enable him to recover for services rendered in that capacity on quantum meruit. *Ib.* 128.

9. Title to an office cannot be tried upon a mandamus neither at common law nor under the statute. *People* v. *Olds*, 3 Cal. 170.

10. A municipal charter provided for an election of officers in May and at the general election thereafter annually. The general election was fixed by law for the first Monday in September; it was held that those officers elected in May only held until September when those newly elected should succeed them. *People* v. *Brenham*, 3 Cal. 486.

11. Official terms should not be extended beyond the time clearly defined, but rather shortened by implication, if necessary. *Ib.* 487.

12. A district judge elected at the general election to fill a vacancy, can qualify and supersede a judge who has been commissioned by the governor for the unexpired term of his predecessor. The latter commission expires after an election by the people. *People* v. *Mott*, 3 Cal. 504.

13. The law presumes that every officer will faithfully perform his duties, until the contrary is shown. *Egery* v. *Buchanan*, 5 Cal. 56.

14. The act to prevent extortion in office does not conflict with the constitution. *Ryan* v. *Johnson*, 5 Cal. 87.

15. The act regulating fees in office is not an act of a general nature within the meaning of the constitution. It is entirely of a specific character. *Ib.*

16. It devolves upon an officer to see that proper bonds are filed, and the state has no right to visit upon a party the laches of her own officer. *People* v. *Aikenhead*, 5 Cal. 107.

17. When an officer is elected to a new term he should give a new bond, and the sureties on the bond of an officer for one term will not be liable for any act done by him after election to a second term. *Ib.*

18. The legislature possess the power to alter or abridge the term of office of purely legislative creation. *People* v. *Haskell*, 5 Cal. 359.

19. In quo warranto the person who claimed the office held by the defendant, testified that his certificate of election was lost or destroyed, and the county clerk swore that there was not in his office or so far as he knew in the county, any record or written evidence of the persons who were elected to the different county offices: held, that this testimony was sufficient to let in secondary evidence of the election and certificate. *People* v. *Clingan*, 5 Cal. 391.

20. Where it appeared that the claimant of the office had acted as sheriff, that being the office in controversy, that fact together with the certificate of election, would raise the presumption that he had executed his bond and taken the oath of office. *Ib.*

21. Courts cannot know an under officer, and the act and return of a deputy sheriff is a nullity unless done in the name and by the authority of his principal. *Joyce* v. *Joyce*, 5 Cal. 449.

22. Elections to fill vacancies occasioned by the death or resignation of an officer, are special elections. *People* v. *Porter*, 6 Cal. 28.

23. A resignation of an officer is ineffectual without its acceptance by the appointing power. *Ib.*

24. An officer will not be presumed to have exceeded his authority, especially the officer of a foreign government. *Den* v. *Den*, 6 Cal. 82.

25. Where the act organizing a county provides for the term of office of the officers first elected, but makes no provision as to their successors, the duration of the term of the latter is governed by the general law. *People* v. *Colton*, 6 Cal. 85.

26. Wherever the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment. *Downer* v. *Lent*, 6 Cal. 95.

27. Though the appointment of a sheriff by a county judge was void, yet the

acts of such sheriff as a de facto officer are good. *People* v. *Roberts*, 6 Cal. 215.

28. The words extending the term of an office "until a successor is appointed and qualified," were intended only to prevent a hiatus or interregnum occurring between the last day of the incumbent's term and the day on which his successor enters into office, during which time the incumbent is a mere locum tenens. *People* v. *Reid*, 6 Cal. 289; *People* v. *Langdon*, 8 Cal. 11.

29. The provision of the constitution giving to the appointing power the right of removal at pleasure, of incumbents the duration of whose term of office is not provided for by the constitution or declared by law, must be construed to deny the right of removal in those cases where the tenure is defined. *People* v. *Jewett*, 6 Cal. 293.

30. Where the law requires a joint and several bond, and the officer filed a bond which was in form joint, and not joint and several: held, that he and his sureties cannot complain that their obligation is less burthensome than the law required. *Tevis* v. *Randall*, 6 Cal. 635.

31. The legislature failing to elect successors to the trustees of the insane asylum, the power of appointment vested in the governor. *People* v. *Baine*, 6 Cal. 510.

32. A law which provides that an officer may be removed in a certain way or for a certain cause, does not restrain or limit the power of removal to a cause or manner indicated. *People* v. *Hill*, 7 Cal. 102.

33. In an action by one claiming to have been elected to an office, against his predecessor, to compel a surrender of the books, papers, etc., belonging to the office, plaintiff must show prima facie that a vacancy existed in the office and that he was elected to fill it. *Doane* v. *Scannell*, 7 Cal. 394; *People* v. *Scannell*, 7 Cal. 439.

34. Where the law requires an officer to file a new bond within two days after the meeting of the supervisors, the officer has the whole of the two days succeeding the day of meeting to execute and present his bond. *People* v. *Scannell*, 7 Cal. 439.

35. Where a party seeks to enter upon the duties of an office, and he is required to give a bond as a condition precedent, and he does execute and present a good bond with sufficient sureties, and the officer or board whose duty it is to approve or reject the same neglects or refuses to act, it is not sufficient cause to defeat his rights. *Ib.* 440.

36. There is a very plain difference between the condition of a party claiming a right to enter upon the duties of an office and that of a party already in office, and who is sought to be excluded upon the ground of a forfeiture. *Ib.*

37. An information in the nature of a quo warranto is the proper proceeding to try the title to an office. *Ib.* 443.

38. Where the appointment to an office is vested in the governor, with the advice and consent of the senate, and the term of the incumbent expires during a recess of the legislature and the governor appoints a successor to the office: held, that there has been no vacancy in office, and that this appointment vested in the appointee a right to hold for his full term, subject only to be defeated by the nonconcurrence of the senate. *People* v. *Mizner*, 7 Cal. 523; *People* v. *Addison*, 10 Cal. 7.

39. Where the term of an officer is fixed by the constitution or the statute, the power of removal does not vest in the executive. *People* v. *Mizner*, 7 Cal. 526.

40. If there was a term in the office, and the party had not been elected until one month after the expiration of the old term, it is evident that he could not hold but one year and eleven months, instead of the two years that the law says he shall. *People* v. *Langdon*, 8 Cal. 13.

41. Power to fill a vacancy and power to fill an office are distinct and substantial in their nature. *Ib.* 15.

42. The clerks of the different departments are officers within the meaning of section six of the act of April 21, 1856, reducing the salaries of officers. *Vaughn* v. *English*, 8 Cal. 41.

43. The acts of the officer making the assessment must be presumed to be in conformity with law, until the contrary is shown. *Palmer* v. *Boling*, 8 Cal. 389.

44. The sureties upon the official bond of an officer are only responsible for the official acts, and not for private debts. *Hill* v. *Kemble*, 9 Cal. 72.

45. The defects in official bonds which are cured upon their suggestion in the complaint, in an action upon such bonds, under the eleventh section of the "act

concerning the official bonds of officers", are omissions which, but for the statute, would operate to discharge the obligors. *People* v. *Edwards*, 9 Cal. 292.

46. The provision of the code, requiring actions against a public officer for acts done by him in virtue of his office, shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty. *McMillan* v. *Richards*, 9 Cal. 420.

47. A patent purporting to convey the lands of the State, is prima facie evidence of title in the grantee, as the law presumes in favor of the acts of all public officers. *Summers* v. *Dickenson*, 9 Cal. 556.

48. The office having been created, must be presumed to be continuing, unless limited by the terms of the act, or by the nature of the duties to be performed. *People* v. *Addison*, 10 Cal. 7.

49. The federal office of surveyor general is a lucrative office, and the office of controller of the State an office of profit under the twenty-first section of the fourth article of the constitution of the State. *People* v. *Whitman*, 10 Cal. 43.

50. To constitute the "holding" of an office, within the meaning of the constitution, there must be the concurrence of two wills— that of the appointing power, and that of the person appointed. *Ib.*

51. When the constitution clearly enumerates the events that shall constitute a vacancy in a particular office, we must suppose all other causes of vacancy excluded, especially when this construction can lead to no injurious results. *Ib.* 45.

52. The failure on the part of the controller elect to qualify, creates no vacancy in the office, if there is an incumbent to hold over. *Ib.*

53. In determining upon the sufficiency of the bond of an officer, and whether the officer by his failure to comply with the requisition of the supervisors to file a new bond, has vacated his office, the supervisors exercise powers of a judicial character. *People* v. *Supervisors of Marin County*, 10 Cal. 345.

54. The power to declare an office vacant is vested under the statute where the duty to approve the bond of the officer is lodged. That duty is imposed upon the county judge and not the supervisors; and where the supervisors declared the office of constable vacant, because the constable failed to comply with their order to file a new bond: held, that they exceeded their jurisdiction. *Ib.* 346.

55. An order of the supervisors, requiring a new bond of an officer, should specify the ground upon which the order is made; and where the supervisors made an order as follows: "ordered, by the board of supervisors, that the constable file another bond, with two or more sufficient sureties, within fifteen days": held, that the order was fatally defective. *Ib.*

56. A court is only justified in interfering with duties cast upon public officers by the law, when the fund is in danger of being wasted or impaired. *City of San Francisco* v. *Commissioners of the Funded Debt of City of San Francisco*, 10 Cal. 587.

57. An election to fill a vacancy in the office of district judge is invalid unless made under and in pursuance of the proclamation of the governor. *People* v. *Weller*, 11 Cal. 65; *People* v. *Wells*, 11 Cal. 339.

58. The clerk of the supreme court, though a constitutional officer, is subject to its orders in the control of its records. *Houston* v. *Williams*, 13 Cal. 28.

59. The act giving jurisdiction over the subject of contested elections to the judge of the county court, is constitutional, and district judges are embraced within it. *Saunders* v. *Haynes*, 13 Cal. 154.

60. A district judge inducted into office, with a commission from the governor showing him to be entitled to it from a certain date, draws the salary annexed to the office from that date, and the question of his eligibility cannot be tried on mandamus. *Turner* v. *Meloney*, 13 Cal. 623.

61. The legislature having vested certain duties in a public officer, for whose services compensation is allowed, may take those duties and the fees from the office before the expiration of the term and confer them upon another officer. *People* v. *Squires*, 14 Cal. 15.

62. In quo warranto to determine the right to an office, an allegation that defendant is in possession of the office without lawful authority, is a sufficient allegation of intrusion and usurpation. *People* v. *Woodbury*, 14 Cal. 45.

63. If an incumbent resigns before the expiration of his term, there is a vacancy to be filled by the governor. His appointee would hold until the next general election, or at most until the qualification of the person elected by the people. *People* v. *Rosborough*, 14 Cal. 187.

64. Where an appointee of the governor to fill a vacancy in a judicial office, holds the office for several years because of no valid election by the people of his successor, his acts are as binding and effectual as to third persons as though he held the office by strict law. *Ib.* 188.

65. In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties; and a judgment against the officer in a suit to which they are not parties, is not evidence against them. *Pico* v. *Webster*, 14 Cal. 204.

66. The board of supervisors cannot abrogate a contract with defendant as county physician, by rescinding the order under which he was appointed or abolishing the office. *McDaniel* v. *Yuba County*, 14 Cal. 445.

67. It is part of the constitutional policy of this State that all elective officers connected with the executive department of the government shall be elected at the same time and place, and in the same manner. *People* v. *Melony*, 15 Cal. 62.

68. A controller must be elected biennially, at the same time and place and in the same manner with the governor and lieutenant governor, and an appointment of a controller by the governor before this biennial general election, whatever its effect otherwise, cannot defeat this constitutional policy, nor deprive the people of their right to fill the office of controller at such election. *Ib.*

69. Nor can election by the people, had before the election fixed for filling the office of governor, etc., defeat this policy. *Ib.*

70. *People* v. *Whitman*, 10 Cal. 116, doubted as to the point involved in that case; and as to the validity and effect of the election of the controller at the general election in September, 1858, held to be no authority. *Ib.*

71. The controller elect may take his office, whether the governor qualifies or not. *Ib.* 63.

72. In a proceeding by an elector to contest the right to an office of a party returned as elected thereto at a general election, the defendant first moved to dismiss the proceedings; his motion being overruled, he declined to answer the statement filed by the contestant, and the court, without proof by either party, annulled the election: held, that this was error, and that the proceeding should have been dismissed. *Searcy* v. *Grow*, 15 Cal. 122.

73. The public is interested in a contest of this character; it is not a matter solely between the parties to the record, and the popular will is not to be set aside upon the mere failure of a party to respond to charges alleged against his right by an individual elector. It is not sufficient that ample causes of contest be set forth in the statement filed by a contestant; their truth must be established by clear proof, before an election can be annulled. *Ib.*

74. In suit under our statute by an elector, to contest an election, he becomes a party, and is responsible for costs if he fail. The court has no discretion to dismiss or entertain the case, as it deems the public interest requires. Nor has the State's attorney such discretion. The case is prosecuted like any other action instituted by a private citizen, subject only to the provisions of the statute. *Ib.*

75. Under the twenty-first section of article four of the constitution of this State, a person holding a federal office described in that section, is incapable of being elected to a State office; he cannot receive votes cast so as to give him a right to take the State office upon or after resigning the federal office. The word "eligible" in this action means capable of being chosen, the subject of selection or choice. *Ib.* 123.

76. The term "compensation," in section twenty-one, article four of the constitution of this State, means the income of the office, not the profit over and above the necessary expenses of the office. *Ib.*

77. An ordinance was passed by the board of supervisors of the city and county of Sacramento, June, 1858, relative to the cemetery, in which it was provided, that the board should appoint a person to superintend the cemetery, "annually, in October, who shall hold office for the term of one year:" and further, that the board, at their first meeting after the passage of the ordinance, should appoint a superintendent to hold office "until October next,

and until his successor is appointed and qualified." Defendant was so appointed July 8th, 1858, and held office until December, 1859, the board having failed to appoint his successor before that time, when relator was appointed: held, that relator was entitled to the office; that the failure to appoint in October, 1858 and 1859, did not exhaust the power of the electoral body — the time named being directory, and not of the essence of the power. *People* v. *Murray*, 15 Cal. 222.

78. The rule is, that when time is prescribed to a public body in the exercise of a function in which the public is concerned, the period designated is not of the essence of the authority, but is a mere directory provision. *Ib.* 223.

79. The official act of such officers in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority. *Hart* v. *Burnett*, 15 Cal. 616.

80. The authority to grant such lands was vested in the ayuntamiento, and in the alcaldes or other officers who at the times represented it, or had succeeded to its "powers and obligations." *Ib.*

81. Where political power is vested in a public officer, he is responsible only in his political character to the country. Where discretion is vested in him, he but conforms to the law in exercising that discretion. But where a question of political power is not involved, where no discretion exists, but a specific legal duty is imposed, ministerial in its character, such as the issuance of a patent, the delivery of a commission, the payment of a specific sum, or the drawing of a particular warrant, and in the performance of that duty individuals have a direct pecuniary interest, the officer, like any other citizen, is subject to process of the regularly constituted tribunals of the country. If this be not so, then the officer can "sport with the vested rights of others, and the government will cease to deserve the "high appellation" of being a government of laws. *People* v. *Brooks*, 16 Cal. 54.

82. The aid of courts can be invoked only as against such officers as are intrusted by law with the management of the affairs of a corporation, and as against these, the remedy is at law, and not in equity. *People* v. *Hill*, 16 Cal. 148.

83. The power of removing the private or ministerial officers of a private corporation, belongs to the corporation alone. Courts cannot remove such officers. *Ib.*

84. In suit by a stockholder in a private corporation, against the corporation and four of the trustees, who owned stock sufficient to enable them to control the business of the company, for an account and settlement of its affairs, alleging fraud and mismanagement on the part of the trustees, the court below, by its decree, deprived one of said trustees of his salary as superintendent of the business corporation: held, that this was error; that although such superintendent was also trustee and treasurer of the corporation, contrary to a positive provision of the by-laws; and although, in the management of the business of these offices, no attention had been paid to the by-laws and regulations of the corporation, yet as no fraud was shown, and as the superintendent had faithfully performed his duties as such, he was entitled to his salary. *Ib.* 149.

85. Where four of the trustees of a private corporation, owning sufficient stock to control its business, conduct the business in a grossly negligent manner, systematically disregarding the by-laws, keeping no account of receipts and expenditures, failing to pay their own assessments, without any excuse: held, that a stockholder may sue in equity for an account, making the corporation and said trustees alone parties—no objection being taken that all the stockholders were not parties —and the trustees will be compelled to make good any loss occasioned by their negligence or improper conduct. *Ib.* 151.

See APPOINTMENT TO OFFICE, ASSESSOR, ATTORNEY DISTRICT, ATTORNEY GENERAL, AUDITOR, BOND OFFICIAL, CLERK OF THE COURT, COUNTY JUDGE, ELECTION, GOVERNOR, QUO WARRANTO, RECORDER, SHERIFF, SUPERVISORS, SURVEYOR, TAX COLLECTOR, TREASURER, VACANCY.

OPINION.

1. At common law, the appellate court either affirms or reverses the judgment upon the record before it. The opinion which is rendered is advisory to the inferior court, and after the reversal of an erroneous judgment, the parties in the court below have the same rights which they originally had. *Stearns* v. *Aguirre*, 7 Cal. 448.

2. The terms "opinion" and "decision" are often confounded, yet there is a wide difference between them, and in ignorance of this, or by overlooking it, what has been a mere revision of an opinon has been sometimes regarded as a mutilation of the record. *Houston* v. *Williams*, 13 Cal. 27.

3. A decision of the court is its judgment, the opinion is the reasons given for that judgment. The former is entered of record immediately upon its rendition, and can only be changed through a regular application to the court, upon a petition for a rehearing or for a modification. The latter is the property of the judges, subject to their revision, correction and modification in any particular deemed advisable until with the approbation of the writer, it is transcribed in the record. *Ib.*

4. When opinions have been revised, and finally approved and recorded, then they cease to be subject of change. They then become like judgment records, and are beyond the interference of the judges, except through regular proceedings before the court by petition. *Ib.*

ORDER.

1. An order is a decision made during the progress of the cause either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court or necessary to be determined in carrying into execution the final judgment. *Loring* v. *Illsley*, 1 Cal. 27.

2. An appeal should not be taken from an order of the court refusing to set aside an interlocutory order. It should be taken from the order itself if any appeal would lie. *Stearns* v. *Marvin*, 3 Cal. 376.

3. An appeal does not lie from an interlocutory order except in cases provided by statute. *People* v. *Thurston*, 5 Cal. 517; *De Barry* v. *Lambert*, 10 Cal. 504; *Baker* v. *Baker*, 10 Cal. 528.

4. An order is the judgment or conclusion of the court or judge, upon any motion or proceeding, and includes cases where affirmative relief is granted or relief denied. *Gilman* v. *Contra Costa County*, 8 Cal. 57.

5. The supreme court will not hear any objections to an order entered in the court below, by consent of parties. *Meerholz* v. *Sessions*, 9 Cal. 277.

For appeal from orders of court see APPEAL, IX.

ORDINANCE.

1. The city charter of San Francisco provides that no ordinance or resolution shall be passed except by a majority of all the members elected; the number elected being eight: held, that an ordinance passed by a vote of four in the affirmative to three in the negative, was not passed by a majority of all the members elected, and was therefore void. *City of San Francisco* v. *Hazen*, 5 Cal. 171.

2. Where a city ordinance authorizes the making of a contract by certain committees, on behalf of the city, "subject to confirmation by the common council of said city," a confirmation by joint resolution, and not by ordinance, is sufficient. *San Francisco Gas Co.* v. *City of San Francisco*, 6 Cal. 191.

3. Under the charter of the city of San José, an ordinance abolishing the office of street commissioner, and substituting fees instead thereof, is legal and binding on the officer. *Wilson* v. *City of San Jose*, 7 Cal. 276.

4. *Where an ordinance for the sale of city property was passed without the majority required by the charter, and before the sale*

another ordinance was legally passed appropriating a portion of the proceeds arising from the sale: held, that the second ordinance was a sufficient recognition of the first to render the sale valid and binding on all parties. Holland v. *City of San Francisco*, 7 Cal. 378; overruled in *Mc Cracken* v. *City of San Francisco*, 16 Cal. 622.

5. *Ordinances for the sale of property of a municipal corporation are subject to the rules of interpretation applicable to the written instruments of individuals, and not to those by which laws are construed. Holland* v. *City of San Francisco*, 7 Cal. 379; overruled in *Mc Cracken* v. *City of San Francisco*, 16 Cal. 622.

6. Where, in a suit brought by a municipal corporation upon a contract made under an ordinance, the defendant offered to prove a parol change in the contract, which the court refused to allow: held, not to be error, as the change in the contract could only be made by ordinance. *City of Sacramento* v. *Kirk*, 7 Cal. 420.

7. As the owner of property, the city has a right to make contracts for its sale, lease or improvement; and these contracts though informal at the time, may afterwards be ratified by ordinance, provided the vested rights of others are not impaired. An ordinance will estop the city, while acts in pais will not. *Lucas* v. *City of San Francisco*, 7 Cal. 469.

8. Where a municipal corporation has the power to perform an act, and in the execution thereof, the prescribed form is not followed, it has the power to subsequently ratify and confirm the informal act, so as to make it as binding as if originally done in the proper manner. *Ib.* 472.

9. The proposition that a municipal corporation can incur no liabilities otherwise than by ordinance, is not, in its full extent, tenable. Under some circumstances, a municipal corporation may become liable by implication. *San Francisco Gas Co.* v. *City of San Francisco*, 9 Cal. 469.

10. The answer that the defendant, a municipal corporation, has no knowledge or information of an ordinance set out in a verified complaint and therefore denies the same, is insufficient. *Ib.* 470.

11. An ordinance for the improvement of the streets passed by the council before the expiration of the time for the presentation of the protest, is not thereby invalid. *Burnett* v. *City of Sacramento*, 12 Cal. 82.

12. An ordinance passed by the board of supervisors of the city and county of Sacramento, June, 1858, relative to the cemetery, in which it was provided that the board should appoint a person to superintend the cemetery, "annually in October, who shall hold office for the term of one year;" and further, that the board at their first meeting after the passage of the ordinance, should appoint a superintendent to hold office "until October next, and until his successor has been appointed and qualified." Defendant was so appointed July 8, 1858, and held office until December, 1859, the board having failed to appoint his successor before that time, when relator was appointed: held, that relator is entitled to the office; that the failure to appoint in October, 1858 and 1859, did not exhaust the power of the electoral body—the time named being directory, and not of the essence of the power. *People* v. *Murray*, 15 Cal. 222.

13. The rule is, that when time is prescribed to a public body in the exercise of a function in which the public are concerned, the period designated is not of the essence of authority, but is a mere discretionary provision. *Ib.*

14. The board of commissioners of the old sinking fund of 1850, created by an ordinance of the city of San Francisco, had no power to sell the real estate of the city, the ordinance being void. But this decision has no application to the board of commissioners of the funded debt, organized after the dissolution of the first board of the sinking fund commissioners. *Heydenfeldt* v. *Hitchcock*, 15 Cal. 514.

15. The act of the State legislature of March, 1858, confirming the so called Van Ness ordinance, was a legal and proper exercise of the sovereign power; and this act gave full effect to the provisions of that ordinance, and vests in the possessors therein described, as against said city and State, a title to the lands in said ordinance mentioned. *Hart* v. *Burnett*, 15 Cal. 616.

16. Whatever interest the city of San Francisco, as defined by the charter of 1851, had in the beach and water-lot prop-

erty, on the 1st day of January, 1855, was transferred to and vested in the parties who were in the actual possession thereof on that day—provided their possession was continued up to June 20th, 1855, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process—by virtue of the Van Ness ordinance and the act of March 11th, 1858, ratifying and confirming the same, and such parties can defeat the claim of plaintiff who holds under a conveyance by the president and two members of the board of land commissioners, created by act of May 18th, 1853, providing for the sale of the State's interest in the property within the water line front, as defined by the act of March 26th, 1851. *Holladay* v. *Frisbie*, 15 Cal. 637.

17. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento have the power to levy a license tax upon the business of a merchant, and to collect such tax by ordinary suit. *City of Sacramento* v. *Crocker*, 16 Cal. 122.

18. An ordinance graduating the amount of such tax according to the amount of the monthly sales of the merchant, is not unconstitutional because the tax is unequal. The tax is not on the goods, but on the business, and the provision for determining the amount of the tax is uniform and equal, applying to all persons in the same category. *Ib.*

19. The common council of the city of San Francisco passed an ordinance authorising the street commissioner to advertise for proposals to grade, plank and sewer a portion of Mission street, in said city, "the same to be paid for by the property holders adjacent * * the proposals to be opened and awarded by the street commissioner, with the committees on streets from the boards of Aldermen." This ordinance was published for ten days successively in a daily newspaper of the city, and the advertisement required was made in like manner for the same period. Proposals based upon certain specifications, were received under the ordinance, and opened by the committees of the two boards and the commissioner, and the work awarded to B. Subsequently an instrument was executed by B., as contractor, and by the street commissioner, purporting to act in the name of the city, setting forth the acceptance by the city of B.'s proposal, and an agreement by her to pay him for the work at certain designated rates, and an agreement on his part to do the work to the satisfaction of the city and the street commissioner. B. began the work, and afterwards transferred his contract and his interest therein to plaintiff, who completed the work in the best manner, and to the satisfaction of the street commissioner and the city. The work was measured as it progressed, by the city's engineer, who duly certified to the accounts for the same, which accounts were duly audited, and upon them warrants were drawn by the controller, by authority of the city, and delivered to plaintiff. The warrants were presented to the treasurer and payment demanded, and refused on the ground that there were no funds in the treasury applicable to them. Previous to the demand assessments had been duly levied by the city upon the property adjacent to the improvements, to meet their expenses, and these assessments had been collected by the collector of street assessments, and by him paid into the city treasury. Plaintiff sues the city, as liable either on the express contract, or upon the warrants, or upon implied contracts, for the services rendered and materials furnished, or for money received by defendant to his use: held, that as under the charter, the city had authority to order the improvements in question, the acceptance of the proposals of B. by the street commissioner and the committees of the two boards, converted what were previously mere propositions on the part of the city, into contracts perfect in all their parts, binding alike upon the city and the contractor. *Argenti* v. *City of San Francisco*, 16 Cal. 277.

20. Held, further, that the city is primarily liable; that she, and not the contractor, must look to the property holders adjacent to the improvements, for the necessary expenses; that the property holders are not parties to the contracts; that the city must levy and collect the assessments; that the contractor has no claim upon the property or the property holders, but must look alone to the city; that the clause in the ordinance as to how the improvements shall be paid for, is only a designation of the sources upon which the city relies for payment. *Ib.* 282.

21. In this case, the city having discharged the assessments, by receiving in payment thereof outstanding warrants, she is primarily liable to plaintiff as for moneys received to his use, even on the theory that she acted simply as the agent of the plaintiff in collecting the assessments. *Ib.* 283.

22. The charter of 1851 of the city of San Francisco vested the legislative power of the city in a common council, consisting of a board of aldermen and a board of assistant aldermen, each composed of eight members, and provided that no ordinance or resolution should be passed unless by a majority of all the members elected to each board. On the fifth of December, 1853, the mayor of the city approved of what purported to be an ordinance passed by the common council, providing for the sale of certain slip property of the city. This ordinance is designated in the official book of city ordinances as ordinance number four hundred and eighty-one. At the time the ordinance was presented to the board of assistant aldermen, there was a vacancy in the board, occasioned by resignation of one of its members, so that there were but seven members in office. Of these seven, four members voted for the ordinance, and three against it: held, that the ordinance not having received a majority of the entire board—of the constituent number—was never passed, but was in fact rejected. *McCracken* v. *City of San Francisco*, 16 Cal. 618.

23. The alleged ordinance number four hundred and eighty-one authorized and required the mayor and joint committee on land claims of the city to sell the property specified at public auction, to the highest bidder, at such time and place as they might think advisable, after not less than ten days' advertisement. The sale was advertised for December 26th, 1853. Within one hour previous to the sale, the common council passed an ordinance, designated in the official book as ordinance number four hundred and ninety-three, appropriating certain proceeds of the intended sale: held, that this recognition of the existence of ordinance number four hundred and eighty-one, and the appropriation of a portion of the proceeds of the sale, did not constitute an adoption and approval of what had been previously done, or might be subsequently done according to the terms of that ordinance, so as to give validity to the sale which took place. *Ib.*

24. The only authority the common council possessed to sell city property was derived from the thirteenth section of article three of the charter, and this section provides for the sale of the property in one way only, to wit: by the passage of laws, which term is synonymous with ordinances, when applied to acts of municipal corporations. The mode of selling the property having been pointed out by the charter, was restrictive—no other mode could be followed. *Ib.* 619.

25. The only way in which the common council could give validity to a sale, was by passing a law directing it. Ordinance number four hundred and ninety-three does not purport to provide for any sale, but simply assumes that an ordinance ordering a sale had already passed; but this assumption could impart no vitality to the alleged ordinance number four hundred and eighty-one. The common council could pass a law or ordinance only in one way, and that was by voting for it. *Ib.* 620.

26. The land directed by the terms of ordinance number four hundred and eighty-one to be sold, was set apart and dedicated as a public dock by an ordinance passed in 1852, and while this dedicating ordinance remained in force, no sale could be legally had. In dedicating the land to public use, the common council exercised powers purely of a governmental nature, and not those of a mere property holder. It was by legislation that the dedication was made, and only by legislation could the public franchise be destroyed. *Ib.*

27. The distinction taken between the powers of a municipal corporation, when acting in its political and governmental character, and when acting with reference to its private property, has no application to the questions involved in the case at bar. Its powers, whether regarded as political or governmental, or those of a mere private corporation, could be exercised only in conformity with the provisions of the charter. The legislature could impose such restrictions as it thought proper, and it saw fit to require the formalties of legislation for the disposition of the city property, as it did for the imposition of taxes, the regulation of the fire depart-

ment, and matters connected with the general welfare of the city. *Ib.* 621.

28. *Holland* v. *The City of San Francisco*, 7 Cal. 361, distinguishable from this case in this: that there, the fact that the property had been previously dedicated to public use as a public dock was not presented; but that case is not law, and is overruled, so far as it holds that ordinance number four hundred and ninety-three recognized and adopted ordinance number four hundred and eighty-one, so as to render the subsequent sale valid and binding upon all parties. *Ib.*

29. Admitting that ordinance number four hundred and ninty-three did adopt and pass number four hundred and eighty-one, it did so only within one hour previous to the sale. But this ordinance directs the sale upon ten days' previous advertisement. The authority to sell upon ten days' notice was not therefore pursued, and the sale without such notice was void. *Ib.* 622.

30. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given; and where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. *Ib.* 623.

31. Where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance. *Ib.*

32. A ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able, at the time, to make the contract to which, by his ratification, he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself. *Ib.* 624.

33. Ordinance number five hundred and five of the city of San Francisco, passed January 10th, 1854, by which the mayor and land committee were authorized to pay out of moneys in their hands, arising from the sale ordered by ordinance number four hundred and eighty-one, the salaries of the members and officers of the police for the months of November and December of the previous year, does not ratify ordinance number four hundred and eighty-one, because appropriating the proceeds of the sale. It assumes that ordinance number four hundred and eighty-one was valid, and there is nothing in the appropriation from which an intention to ratify can be implied. If the intention to ratify under some circumstances could be thus implied, the implication would be of no avail in the present case, as the common council were at the time laboring under the mistaken impression that ordinance number four hundred and eighty-one had become law. Ratification, to be effective, must be made with full knowledge of all the facts relating to the act ratified. To entitle any proceedings of the common council to the slightest consideration as evidence of ratification, it must be shown that those proceedings were taken with full knowledge that the ordinance had never passed, and that the sale thereunder was an absolute nullity. *Ib.* 625.

34. Inasmuch as by article six, section six, of the charter of San Francisco of 1851, the common council could authorize a sale of city property at public auction only, ratification of a previous sale is impossible. The object of the ratification is to vest in the previous purchaser the title; but at public auction there would be no certainty of this, for at the auction every one would be at liberty to bid, and the property would fall to the highest bidder. *Ib.* 626.

35. The city of San Francisco is not estopped from denying the sale made under ordinance number four hundred and eighty-one, and asserting title to the property sold. The matters relied upon by way of estoppel, with the exception of ordinance number four hundred and ninety-three, occurred after the sale, and could not have influenced the plaintiff in his purchase. Ordinance number four hundred and ninety-three, directing an appropriation of a portion of the anticipated proceeds, was passed within one hour of the sale, and it nowhere appears that the same was ever brought to the notice of the plaintiff. Nor does it appear that there was any fraud or intention to deceive on the part of the common council They acted, in passing ordinance number four hundred and ninety-three, and in the

subsequent use of the proceeds, upon the impression that a valid ordinance authorizing the sale had been passed. *Ib.* 627.

36. The sale of December 26th, 1853, under ordinance number four hundred and eighty-one, being void, no title passed to the purchasers at that sale. The title to the property still exists in the city, except where deeds have since been taken under the acts of 1858 or 1860. The property remaining can at any time be taken possession or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert her title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money. *Ib.* 632.

See MUNICIPAL CORPORATION.

OWNERSHIP.

I. In general.
II. Of vessels.

I. IN GENERAL.

1. Laying off the premises into town lots, selling the same, and exercising other acts of ownership over them, does not operate as an abandonment, but taken in connection with previous acts of ownership, would rather seem to strengthen the plaintiff's possession. *Plume* v. *Seward*, 4 Cal. 97.

2. Possession is prima facie evidence of ownership. *Goodwin* v *Garr*, 8 Cal. 616; *Killey* v. *Scannell*, 12 Cal. 75.

3. Where A, the owner of property, represents that certain property in his possession belongs to B, and that representation coming to the ears of C, a creditor of B, who sues out an attachment against B, and seizes the property: held that A is estopped from setting up claim to the property. *Mitchell* v. *Reed*, 9 Cal. 205; *McGee* v. *Stone*, 9 Cal. 606.

4. To overcome the prima facie ownership of property in the debtor, the receiptor must prove two things: first, that he claimed the property; second, that it was in fact his own. *Bleven* v. *Freer*, 10 Cal. 177.

5. The whole course of legislation and judicial decisions in this State, since its organization, has recognized a qualified ownership of the mines in private individuals. *State of California* v. *Moore*, 12 Cal. 70.

6. The ownership of goods is not changed when the claim to such ownership is based on a fraudulent contract. *Butler* v. *Collins*, 12 Cal. 461.

7. Defendant killed deceased while he was in the act of injuring a mining claim. On the trial, defendant offered to show that he was the owner, and in the lawful possession of said claim at the time of the killing. The court refused testimony on this point: held, that defendant had a right to prove his ownership of the claim, for the purpose of showing his mental condition, the motive which prompted his action, and determining the character of the offense; that the ownership was part of the res gestæ, and should have been admitted, subject to instructions of the court as to its legal effect, though when admitted, it may not have amounted to a justification. *People* v. *Costello*, 15 Cal. 353.

II. OF VESSELS.

8. Under proceedings in admiralty in rem, the interest of one part owner cannot be sold to satisfy a demand due from the vessel itself. *Loring* v. *Illsley*, 1 Cal. 29.

9. The voluntary transfer of a minority interest in a ship does not confer upon the purchaser any more extensive control than the vendor himself enjoyed; nor can a forced sale under execution have a greater effect. *Ib.* 31.

10. The register of a vessel is admissible in evidence for the purpose of proving who are the owners of a vessel. *Brooks* v. *Minturn*, 1 Cal. 482.

11. The owner of a ship chartered by and in the name of his agent, may, although he is not mentioned in the charter party, be shown by extrinsic evidence to be the principal in the contract, and will be allowed to avail himself of its provisions. *Ib.*

12. Where the master of a vessel was in possession, and the record did not disclose any other owner, the admissions of the master were admissible in evidence, with the same effect as if the suit had been against the master himself. *Bailey* v. *Steamer New World*, 2 Cal. 273.

13. The rule of law, that possession of personal property is prima facie evidence of ownership, is uniform in its application. The question of the ownership of a vessel forms no exception to the rule. *Ib.*

14. The complaint showed that the vessel was in 1855 the property of the plaintiffs; that they appeared and defended the action against the vessel as owners, and there is nothing in the record to raise a presumption that they are not now the owners of it, and a judgment against them will be satisfied out of the vessel. *Russell* v. *Conway*, 11 Cal. 101.

See EJECTMENT IV. POSSESSION.

PARENT AND CHILD.

1. In marriages null in law, the issue are the inheritors of the father's name and his heirs apparent, and entitled to look to and demand from him his care, maintenance and protection, and he has the same right to their custody, control and obedience, as if the issue of a valid marriage. *Graham* v. *Bennett*, 2 Cal. 506.

2. The words of an acknowledgment of the paternity of an illigitimate child, for the purpose of making it an heir must be clear, and exclude all except one interpretation. *Estate of Sandford*, 4 Cal. 12.

3. Where the plaintiff was the stepmother of the defendants by whom she was supported, and for whom she performed domestic services, for the value of which she sued the defendants: held, that as she stood in "loco parentis" to defendants, the law does not imply any contract to pay for such services. *Murdock* v. *Murdock*, 7 Cal. 513.

4. When the father promises his infant child a certain reward for doing that which he was already bound to perform, the agreement has no consideration whereon to rest. *Swartz* v. *Hazlett*, 8 Cal. 123.

5. The principle upon which the infant is allowed to collect his wages, is that of agency. The infant can be his father's agent, and whether he is so or not is a question of fact, like any other question of agency, which may be proven by either direct or circumstancial testimony. *Ib.* 124.

6. Where a parent executes to his infant son a conveyance of property, in consideration of services performed, it must be considered as a voluntary conveyance, without legal consideration, as he is not legally bound to pay for his son's services. *Ib.* 125.

7. It is the duty of the parent to supply his child with necessaries, and he is liable to others who furnish them, under certain circumstances; and the duty of the parent to feed, clothe and educate the child, must be commensurate with the power to control and govern. *Ib.*

8. Where A, by a joint deed grants to his son and B certain premises, for which B pays a valuable consideration, and the son pays nothing, and the fact of this want of consideration on the part of the son is known to B, the fraud in part of the conveyance makes it wholly void as against the creditors of A, at the date of the deed. *Ib.* 128.

9. A posthumous child, for whom no provision is made in the will of the father, is entitled to one-half of the separate and common property, where no express intention of the testator to the contrary appears. *Estate of Buchanan*, 8 Cal: 509.

10. Mere hearsay evidence of the wife having given birth to a child, more than a year after the separation, and connecting therewith the name of a third person as its reputed father, raises no presumption of access by the husband. *Wells* v. *Stout*, 9 Cal. 498.

11. A child born in lawful wedlock is presumed to be the child of the husband. The marriage is an acknowledgment by the husband that the child is his; but to be effective there must be knowledge at the time of the fact admitted. Hence, when a man marries a woman with child, the law presumes the child is his. This presumption is based upon the assumed fact that he knew, at the time of his marriage, the situation of the woman. *Baker* v. *Baker*, 13 Cal. 99.

12. A woman to be marriageable must, at the time, be able to bear children to her

husband, and a representation to this effect is implied in the very nature of the contract. A woman who has been pregnant over four months by a stranger, is not at the time in a condition to bear children to her husband, and the representation otherwise was false and fraudulent. *Ib.* 103.

13. A wife, divorced from her husband for extreme cruelty on his part, is entitled to the custody of their female child of tender years, the wife being blameless. The father has a right to see the child at all convenient times. *Wand* v. *Wand*, 14 Cal. 517.

14. Where a son conveys real estate to his father—the only consideration being a verbal agreement by the father to make a will, and devise to the son certain property, and the father dies without having complied with the agreement, the agreement is void—the conveyance is executed without consideration, express or implied, and a trust results in favor of plaintiff by implication of law, and he may set aside the conveyance and recover the property—it being shown that the transaction was not a gift. *Russ* v. *Mebius*, 16 Cal. 355.

15. If, in such case, the conveyance did not express the consideration for which it was given, but acknowledged the payment of a nominal consideration in money, parol evidence would be inadmissible to establish the trust in favor of the son. *Ib.* 356.

16. The doctrine of resulting uses and trusts, is founded upon mere implication of law, and, generally, this implication cannot be indulged in favor of the grantor, where it is inconsistent with the presumptions arising from the deed. Unless there be evidence of fraud or mistake, the recitals in a deed are conclusive upon the grantee, and no resulting trust can be raised in his favor in opposition to the express terms of the conveyance. *Ib.*

17. No implication of trust arises upon a purchase of property by a parent in the name of his child; as is the case when the purchase money is paid by one person, and the conveyance taken in the name of a stranger. Prima facie, such purchase is regarded as an advancement. *Ib.* 357.

PAROL CONTRACT.

See CONTRACT II.

PAROL EVIDENCE.

See EVIDENCE XXX.

PARTIES.

I. IN GENERAL.

1. All persons materially interested in the subject matter of the suit ought to be made parties, and sometimes it is limited to those who are interested in the object of the suit; but courts will not suffer this rule to be so applied as to defeat the very purposes of justice if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable. *Von Schmidt* v. *Huntington*, 1 Cal. 66.

2. This rule will not apply when the persons interested are so numerous that it would be impracticable to join them without interminable delays, and where the parties form a voluntary association for public or private purposes, it would be exceedingly inconvenient to join all in the proceeding, and for such like reasons. *Ib.*

3. Where the bill seeks a dissolution of a company, all the members need not be made parties when it will cause manifest inconvenience and oppressive delays in the action. *Ib.* 67.

4. The position of a priest who appears

to have charge of church property, coupled with an interest, seems to be nearly analogous to that of a sole corporation in England, and has power to sue as an inseparable incident to such corporation. *Santillan* v. *Moses*, 1 Cal. 94.

5. The objection to a defect of parties should be taken by demurrer, or it must be deemed to have been waived and could not then be raised at the trial. *Rowe* v. *Chandler*, 1 Cal. 175; *Sampson* v. *Shaeffer*, 3 Cal. 202; *Warner* v. *Wilson*, 4 Cal. 313; *Beard* v. *Knox*, 5 Cal. 257; *Jacks* v. *Cooke*, 6 Cal. 164; *Oliver* v. *Walsh*, 6 Cal. 456; *Tissot* v. *Throckmorton*, 6 Cal. 473; *McKune* v. *McGarvey*, 6 Cal. 498; *Andrews* v. *Mokelumne Hill Co.*, 7 Cal. 334; *Alvarez* v. *Brannan*, 7 Cal. 510; *Dunn* v. *Tozer*, 10 Cal. 170. *Mott* v. *Smith*, 16 Cal. 557.

6. One copartner cannot sue another unless by bill for a dissolution, praying for an account. *Russell* v. *Ford*, 2 Cal. 87; *Buckley* v. *Carlisle*, 2 Cal. 420; *Stone* v. *Fouse*, 3 Cal. 292; *Nugent* v. *Locke*, 4 Cal. 320; *Barnstead* v. *Empire Mining Co.*, 5 Cal. 269.

7. When part of the defendants are not served with process, the plaintiff may proceed against those served. *Ingraham* v. *Gildermeester*, 2 Cal. 89.

8. In an action against partners, judgment can only be taken against those served with process. *Ib.*

9. When new parties in interest in a case become known to the plaintiff, it adds strength to his right of a new action after judgment had. *Truebody* v. *Jacobson*, 2 Cal. 283.

10. A contract not to sue, made only to a portion of joint debtors, does not release any of them. *Matthey* v. *Galley*, 4 Cal. 63.

11. In ejectment, one or more defendants may be sued and they may answer separately or demand separate verdicts, and if they do not do so, they will be concluded by the general verdict. *Winans* v. *Christy*, 4 Cal. 80; *Ellis* v. *Jeans*, 7 Cal. 417.

12. In an action upon a bond or written undertaking there can be no constructive parties jointly liable with the proper obligors. *Lindsay* v. *Flint*, 4 Cal. 88.

13. An attorney in fact, described as such in the instrument, does not hold the character of trustee, and is not a necessary party to a suit to represent the interest of his principal. *Powell* v. *Ross*, 4 Cal. 198.

14. A, having an award in his favor against a city, and a suit pending to enforce the same, and the council made an appropriation for the payment of the award, it was held that A cannot be compelled to litigate his right with B, who stood by, without notice of his claim. *Wilson* v. *Heslep*, 4 Cal. 303.

15. A party ought not to be allowed the benefit of any proceeding unless he assumes the responsibility of it. *Douglass* v. *Pacific Mail S. S. Co.*, 4 Cal. 305.

16. An assignment of a contract as security for a debt, and also in consideration of a covenant not to sue upon the debt, entitles the assignee to sue on the contract in his own name. *Warner* v. *Wilson*, 4 Cal. 313.

17. Any creditor of an insolvent debtor has the right to be made a party for the purpose of opposing the discharge, or obtaining his proportion of the assets, whether he be named in the assignment or not. *Lambert* v. *Slade*, 4 Cal. 337.

18. When one of two innocent parties must suffer, it must be he who trusted most, or he whose misplaced confidence enabled the wrong to be committed. *Ruiz* v. *Norton*, 4 Cal. 358.

19. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *De Johnson* v. *Selpulbeda*, 5 Cal. 151; *Parke* v. *Kilham*, 8 Cal. 79.

20. If a judgment entered be irregular as embracing more parties than the testimony justifies, the proper practice is to move to correct the judgment in the court below. *Mulliken* v. *Hull*, 5 Cal. 247.

21. The code authorizes the court to make an order directing a party to produce books and papers in courts. *Barnstead* v. *Empire Mining Co.*, 5 Cal. 300.

22. The plaintiff filed her bill to remove a cloud upon her title to land, created by her husband's deed to one of the defendants; and she joined in the bill three other defendants, one of whom had bought a portion of the land from the plaintiff and her husband, and two of whom held a mortgage upon the property, executed by them: held, that the latter were unnecessary parties, as the grantee in the deed and those claiming under him were the only parties necessary to the complete ad-

judication of the case. *Peralta* v. *Simon*, 5 Cal. 313.

23. H. purchased goods of P. & M., which were consigned to P., an agent. H. failed to pay for the goods upon delivery, and P. sued to recover the purchase money: held, that P. had no right of action in his own name. *Phillips* v. *Henshaw*, 5 Cal. 510.

24. It is the duty of a court of equity where all the parties to a controversy are before it, to adjust the rights of all, and leave nothing open for further litigation if it can be helped. *Ord* v. *McKee*, 5 Cal. 516.

25. To enable the assignee of a judgment to sue on the appeal bond filed in the cause, he must have an assignment of the bond. *Moses* v. *Thorne*, 6 Cal. 88.

26. Counties are quasi corporations,* and can sue and be sued, according to the act of May 11th, 1854. *Price* v. *Sacramento County*, 6 Cal. 255; *Tuolumne County* v. *Stanislaus County*, 6 Cal. 442; *Gilman* v. *Contra Costa County*, 6 Cal. 677; 8 Cal. 57; *Placer County* v. *Astin*, 8 Cal. 305.

27. In the absence of any statute to that effect, the State cannot be sued, and the judgment against her is erroneous. *People* v. *Talmage*, 6 Cal. 258.

28. Where plaintiff proceeds on proceedings supplementary to execution, to obtain an order to apply a judgment in favor of the defendant against A to the judgment of plaintiff, it seems that it is not necessary to make A a party to the proceeding. *Adams* v. *Hackett*, 7 Cal. 203.

29. Where an account is verbally assigned to a creditor, with the understanding that, in case he collects it, he will credit his claim with a portion thereof, and return the balance to the assignor, but if nothing is received, no sum is to be credited, the assignment is void, and the assignee cannot sue thereon in his own name. *Ritter* v. *Stevenson*, 7 Cal. 389.

30. Where two defendants are jointly sued and service had on both, the clerk of the court had no authority to enter judgment by default against one, and his act in so doing is without color of law, and void, and may be disregarded or set aside. *Stearns* v. *Aguirre*, 7 Cal. 449.

31. A plaintiff being the real party in interest, has a right to sue upon the bond, though made payable to the people of the State. *Taaffe* v. *Rosenthal*, 7 Cal. 518; *Baker* v. *Bartol*, 7 Cal. 554.

32. All the parties in interest should join in an action of trover, and a failure to join may be pleaded in abatement. *Whitney* v. *Stark*, 8 Cal. 516.

33. Where a plaintiff in an action to foreclose a mortgage against a party who has died since the service of the summons and before judgment, asks for a decree of sale of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the suit. *Belloc* v. *Rogers*, 9 Cal. 125.

34. An agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assignable, and such assignment gives a right of action in the name of the assignee. *Gray* v. *Garrison*, 9 Cal. 328.

35. Where there is no final settlement of the partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their ascertained portion of this amount, no action can be maintained therefor in assumpsit, nor can the claim be assigned so that the assignee may sue. *Bullard* v. *Kinney*, 10 Cal. 63.

36. The failure of the defendant to appear when the cause was called, authorized the trial by the court without the intervention of a jury. *Waltham* v. *Carson*, 10 Cal. 180; *Doll* v. *Feller*, 16 Cal. 433.

37. Our code, for convenience, has given the right to sue on a bond to the party beneficially entitled to the fruits of the action. *Summers* v. *Farish*, 10 Cal. 351; *Prader* v. *Purkett*, 13 Cal. 591.

38. An administrator is a proper party to a foreclosure suit. *Carr* v. *Caldwell*, 10 Cal. 285.

39. Under the old common law practice, the action could only be maintained in the name of the assignor for the benefit of the assignee, but under our system it may be brought in the name of the assignee as the party beneficially interested. *Wheatley* v. *Strobe*, 12 Cal. 98.

40. In a bill to enjoin the issuance of bonds of the city and county of San Francisco by the fund commissioners created

*The opinion in *Hunsacker* v. *Borden*, 5 Cal. 290, has become abrogated by the act of May 11th, 1854, statutes, p. 194, enabling a county to sue or be sued, which act has received judicial construction in *Price* v. *Sacramento County*, 6 Cal. 255, and other cases.

by the act of April 20, 1858, for the claims approved by the board of examiners, it is necessary that some of the persons to whom the bonds are to be issued, should be made parties to the action. *Hutchinson* v. *Burr*, 12 Cal. 103: *Patterson* v. *Supervisors of Yuba County*, 12 Cal. 106.

41. Where two persons are employed by the claimants of a tract of land under a Mexican grant, as agents to procure the confirmation of the grant in the United States courts, and services are thus rendered and expenses incurred by the agent: held, that such service and expense are individual in their character and not jonit, and that separate actions may be maintained by such agents for their expenses thus incurred. *Conner* v. *Hutchinson*, 12 Cal, 127.

42. An action brought by an agent in his own name for a trespass in taking and converting coin from the possession of the agent, in which action the jury found that the coin belonged to the principal, and gave only nominal damages, is no bar to an action by the principal for such coin. *Pico* v. *Webster*, 12 Cal. 141.

43. An alien friend may sue an American in the consular courts of China, established there under the treaty of 1844. *Forbes* v. *Scannell*, 13 Cal. 283.

44. It does not lie in the mouth of the plaintiff below to say defendants, whom he has called in, and who are directly affected by the judgment, are not parties to it, and have no right of appeal. *Jones* v. *Thompson*, 12 Cal. 276.

45. If the sheriff levies upon the property of a person not a party to the execution, he is responsible in an action at law. *Markley* v. *Rand*, 12 Cal. 276.

46. Where three persons are sued on a promissory note given by one of the parties in the name of all as partners, and the evidence fails to show the partnership or the authority of the party making the note to bind all, and one of the parties is nonsuited and judgment taken against the other two: held, that there was no error in such judgment. *Stoddart* v. *Van Dyke*, 12 Cal. 438.

47. The interest which entitles a person to intervene in an action between other parties, must be in the matter in litigation, and of such a direct and immediate character that the party intervening will either gain or lose by the direct legal operation and effect of the judgment. *Horn* v. *Volcano Water Co.*, 13 Cal. 70.

48. Where the record shows in general terms the appearance of parties, the appearance will be confined to those parties served with process. *Chester* v. *Miller*, 13 Cal. 560.

49. The rule requiring all persons materially interested, to be made parties to a suit, is dispensed with when it is impracticable or very inconvenient, as in cases of joint associations composed of numerous individuals. *Gorman* v. *Russell*, 14 Cal. 539.

50. Plaintiff, January 10th, 1858, in a suit entitled "C. *v.* M. and others, composing the Wisconsin Quartz Mining Co.," a corporation, attached a quartz mill and ledge belonging to the corporation. June 26th, 1853, the complaint was amended, so as to make the corporation, as such, the party defendant, and judgment was rendered against the company, August 14th, 1858, the property sold, and plaintiff the purchaser. October, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure August 9th, 1858, sale October following —W. the purchaser. Defendants here are in possession, under sheriff's sale on the decree. Plaintiff claims title under judgment and sale: held, that he cannot recover; that he acquired no lien by his attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ; that plaintiff's rights attach only from the date of his judgment, August 14th, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9th, 1858, under which defendants claim, the latter have the better right. *Collins* v. *Montgomery*, 16 Cal. 403.

51. An action upon a duty due by an auctioneer to the State, under a special statute, not being a prosecution, but a civil action for the recovery of money due the State, is properly brought in the name of the State. *State* v. *Poulterer*, 16 Cal. 532.

52. Executors have the right to institute actions under the general authority conferred upon them by the statute. No special authorization from the probate court is necessary in such cases. *Halleck* v. *Mixer*, 16 Cal. 579.

See DEFENDANT, INTERVENOR, PLAINTIFF.

II. In a Foreclosure Suit.

53. A person claiming an interest in mortgaged premises, subsequent to the mortgage, is a proper party to a foreclosure suit; but cannot be subjected to the costs of the foreclosure beyond those occasioned by his own separate defense. *Luning* v. *Brady*, 10 Cal. 267; *Whitney* v. *Higgins*, 10 Cal. 552.

54. Subsequent incumbrancers are proper parties to a foreclosure suit; and they are necessary parties to a complete adjustment of all interest in the property; and the chancellor would be justified in ordering them to be brought in when not made parties, and they are not in all cases indispensable parties to a decree determining the right of the parties before the court as between themselves. *Montgomery* v. *Tutt*, 11 Cal. 315.

55. Subsequent incumbrancers are not indispensable parties to a foreclosure suit. If not made parties their rights cannot be affected; they are not bound by the decree; their equity of redemption from the purchaser continues, and this they can assert at any time within the period allowed by the statute of limitations. *Ib.*

56. Where a mortgage is given to secure the separate debts of several persons as mortgagees, it is a several security and may be enforced by each creditor, as in case of a separate mortgage. But where other parties are interested in the property, the court will require them to be brought in before ordering a sale or foreclosure. Where in such case, bill avers the other mortgagees are no longer interested, and they are not parties, demurrer for defect of parties does not lie. *Tyler* v. *Yreka Water Co.*, 14 Cal. 217.

57. A subsequent purchaser of land mortgaged is a proper party to a foreclosure suit; and if the complaint be faulty in praying to hold him as trustee of the mortgagor, on account of fraud in the purchase, such defect cannot be reached by demurrer. *De Leon* v. *Higuera*, 15 Cal. 495.

58. Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of premises under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of Wemple *v.* Pender, and has not yet got a sheriff's deed: held, that injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession until the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; and if he chose to recognise the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff cannot complain—his rights not being affected by the proceedings, as he was not a party. *Macovich* v. *Wemple*, 16 Cal. 106.

59. Plaintiff, on obtaining his sheriff's deed, can then institute the necessary proceedings to enforce his rights, and the purchaser at the sheriff's sale under Wemple's decree will occupy no better position than Wemple himself. But so long as Pender has any interest in the property, plaintiff cannot, in advance of his own title, or of the extinction of Pender's, come into equity to enjoin sale. *Ib.*

60. Proceedings in the nature of a suit to foreclose an equity of redemption, held by a subsequent incumbrancer, may be maintained by purchaser under the decree, where such incumbrancer was not made a party to the original suit to enforce the mortgage. Such incumbrancer may be called upon to assert his right, by virtue of his lien, and his equity of redemption, extending to the period provided by the statute of limitations, be thus reduced to the statutory period of six months. *Goodenow* v. *Ewer*, 16 Cal. 468.

61. The owner of the mortgaged premises, where no power of sale is embraced in the mortgage, cannot under any circumstances, be cut off from his estate, except by sale in pursuance of the decree of the court. To give validity to such decree, the owner must be before the court when it is rendered. No rights which he possesses can otherwise be affected, and any direction for their sale would be unavailing for any purpose. *Ib.*

62. A mortgagor, who has not disposed

of his interest, is a necessary party to a suit for a foreclosure and sale, under our law, even though no personal claim be asserted against him. If he has parted with the estate, his grantee stands in his shoes, and possesses the same right to contest the lien, and to object to the sale. And if the grantee be not made a party, the purchaser under the decree acquires no title. *Ib.*

63. It is only when the owner of the estate—whether such owner be the mortgagor or his grantee—has had his day in court, that a valid decree can pass for its sale. Under such decree, the purchaser takes the title which the mortgagor possessed, whatever it may have been, at the execution of the mortgage. *Ib.* 469.

64. A decree in a foreclosure suit for the sale of the premises, where the mortgagor had transferred his estate in the premises previous to the institution of the suit, and his grantee was not made a party, is void so far as it orders a sale. *Boggs* v. *Hargrave*, 16 Cal. 563.

65. A foreclosure suit, under our system, is only a proceeding for the legal determination of the existence of the lien, the ascertainment of its extent, and the subjection to sale of the estate pledged for its satisfaction. Upon the validity and extent of that lien, the owner of the estate, whether mortgagor or his grantee, has a right to be heard, and no valid decree for the sale of the estate can pass until this right has been afforded to him. *Ib.*

66. Only those who are beneficially interested in the claim secured on the estate mortgaged, are necesaary parties to the foreclosure of a mortgage. *McDermott* v. *Burke*, 16 Cal. 589.

67. A mortgagor cannot make a lease which will bind his mortgagee, where the lessee, at the time, has actual or constructive notice of the mortgage. *Ib.*

68. The interest of the lessee, in such case, depends for its duration—except as limited by terms of the lease—upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and, in this State, against the mortgagee; but with its enforcement, the leasehold interest is determined, even though the lessee be not made a party to the foreclosure suit. *Ib.*

69. A tenant of the mortgagor is not interested either in the claim secured nor in the estate mortgaged—that is, in the title pledged as security. He has not succeeded to such estate, or to any portion of it. He does not stand in the position of a purchaser. The estate remains in his lessor; he has only a contingent right to enjoy the premises. The right of the lessor to the possession ends with the deed by which the sale of the premises is consummated; and the tenant's right to possession depends upon that of the lessor, and goes with it; and the tenant having notice, actual or constructive, of the mortgage, need not be made party to the foreclosure. *Ib.* 590.

70. Possibly, a court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold on foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *Ib.*

71. But the tenant has no such absolute right, from the mere fact of his tenancy, as to require him to be a party to the foreclosure, in order to vest the legal title in the purchaser under the decree. *Ib.*

See MORTGAGE.

III. As Husband and Wife.

72. The code gives to a married woman the right to sue without her husband, if the action concerns her separate estate. *Snyder* v. *Webb*, 3 Cal. 86.

73. The code gives to a married woman the right to sue alone when the action is between herself and her husband, and takes away the necessity of suing by prochein ami. It is a remedial statute and must be beneficially construed. *Kashaw* v. *Kashaw*, 3 Cal. 321.

74. The wife in an action for divorce may make a party of any one claiming an interest in the common property. *Ib.* 322.

75. The objection that the wife is improperly joined with the husband as party plaintiff, should be taken advantage of by demurrer, and comes too late on appeal. *Tisot* v. *Throckmorton*, 6 Cal. 472.

76. A wife cannot sue alone to recover the homestead; it is a joint estate with right of survivorship, and both husband

and wife must join in the action. *Poole* v. *Gerrard*, 6 Cal. 73.

77. In an action brought by a married woman concerning property belonging to her as a sole trader, under the act of 1852, the husband need not be joined. *Guttman* v. *Scannell*, 7 Cal. 458.

78. In an action against the husband alone the homestead right cannot be determined. Both parties must be before the court. *Kraemer* v. *Revalk*, 8 Cal. 75: *Van Reynegan* v. *Revalk*, 8 Cal. 76; *Cook* v. *Klink*, 8 Cal 352; *Marks* v. *Marsh*, 9 Cal. 97; *Moss* v. *Warner*, 10 Cal. 297.

79. An action brought by husband and wife against a steamer for breach of a contract to carry the wife to New York, via Nicaragua, the alleged breach consisting in carrying the wife to Panama, and causing her detention there and consequent illness, and other inquiries though based on a contract, sounds in tort, and the wife is a proper and necessary party plaintiff. *Warner* v. *Steamer Uncle Sam*, 9 Cal. 729.

80. When the action concerns the separate property of the wife, and is not between herself and husband, she may sue with or without him. *Van Maren* v. *Johnson*, 15 Cal. 310.

See Husband and Wife.

IV. As Witnesses.

81. Where the defendant calls the plaintiff as a witness, and the plaintiff testifies to new matter not responsive to the inquiries, the defendant may offer himself as a witness in his own behalf, but his testimony must be limited to an explanation or contradiction of such new matter. *Dwinelle* v. *Henriquez*, 1 Cal. 389.

82. A plaintiff or defendant cannot be permitted to testify on the part of his coplaintiff or defendant. *Gates* v. *Nash*, 6 Cal. 194; *Lucas* v. *Payne*, 7 Cal. 96; *Turner* v. *McIlhaney*, 8 Cal. 579.

83. The assignor of a claim is incompetent as a witness in favor of the claim when his assignee is a formal party to the record, and equally so when the suit is prosecuted for the immediate benefit of his assignee, though not a party. *Adams* v. *Woods*, 8 Cal. 315.

84. A party who calls on an adverse party to testify, makes him a witness and waives his incompetency to be heard for himself or for codefendant or coplaintiff. *Turner* v. *McIlhaney*, 8 Cal. 580.

85. If a party be improperly joined as defendant, the court or jury upon application should first pass upon his case, and after he is discharged he could then be examined as a witness for the other defendant. *Domingo* v. *Getman*, 9 Cal. 103.

See Witness.

PARTITION.

1. A deed of release, conveyance and partition, providing for the appointment of commissioners to make partition of the land therein described, according to certain terms set forth in the deed, and also, by its terms, providing that the release shall take effect upon the making the partition and report, by the commissioners, of a map of a partition, which, together with the deed, is to be handed over to one F., who is to file the same for record in the proper office, is sufficient to estop a party thereto from controverting the deed. *Tewksbury* v. *Provizzo*, 12 Cal. 24.

2. On the happening of the event, the deed became effectual as a partition and release. When parties go into a partition of property upon certain terms and conditions, each to receive a several portion of a common estate, the instrument of partition, founded upon mutual releases itself, is such affirmation of interest and title on the part of each as to estop him to deny that he did have interest and ownership in the premises; and the release and conveyance of his interest to his parceners is evidence of title in his grantees which he cannot dispute. *Ib.* 25.

3. Where such commissioners, in pursuance of a contract of a portion of the parties executing such deed, allotted to one G., who was not a party to the deed of partition and release, one hundred acres, and where the defendant claimed through the parties executing such contract, and both contract and deed were upon record at the time of the defendant's purchase: held, that the defendant, in contemplation

of law, had notice of such contract of his predecessors and vendors, and that he is bound by it. *Ib.* 26.

4. Where such commissioners in the partition and allotment failed to divide and allot some marsh land, a part of the tract, and where no proof was offered that this land was of any value, or that the division made was affected in any manner by the failure to divide or allot it, or that the allotments made would in any degree have been affected by the allotments of this, or that any injury resulted to any one interested in consequence of this omission, and where important rights have vested under the partition, this court would not be warranted in holding the action of the commissioners void because of the failure to divide and allot the marsh land. *Ib.*

5. A tract of land was held by several tenants in common, and on partition a certain portion was set apart and quitclaimed to plaintiff, representing M., who had conveyed to plaintiff as security for endorsements. Another portion of the land was set apart and quitclaimed to H. The portion thus received by H. was subsequently conveyed to plaintiff, and embraces the land in controversy: held, that plaintiff is not mortgagee of the premises; that even if he held the premises conveyed by H. to him as security for the indorsements of M., it was as trustee of the legal title; that the title had passed from H., and had never been in M., except of an undivided interest before the partition, and was, therefore, in plaintiff, who could maintain ejectment. *Seaward* v. *Malotte*, 15 Cal. 307.

6. Plaintiff sues defendants for partition of certain property. The court orders a sale of the property and distribution of the proceed. After the sale G. files a petition stating that he is a creditor of one F. M. Harris (not plaintiff) and has an attachment lien on the interest of said F. M. Harris in the property sold; that said property in fact belonged to F. M. Harris, and that any conveyance of the same from him to plaintiff were merely colorable for the use and benefit of F. M. Harris, and made to hinder, delay and defraud his creditors. G. asked the court to pay him the share of the proceeds of the partition sale coming to plaintiff. Court refused: held, that there was no error; that the petition of G. being an attempt to defeat a conveyance to plaintiff on the ground of fraud, is insufficient in this: that there is no allegation of the insolvency of F. M. Harris, and that the charges of fraud were too general and do not state the specific facts constituting the fraud. *Harris* v. *Taylor*, 15 Cal. 349.

7. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his cotenant in possession to account for rents and profits received by him from tenants of the premises. *Goodenow* v. *Ewer*, 16 Cal. 272.

8. From rents so received the tenant in possession may deduct the amounts paid for taxes and for necessary and proper repairs and additions for the preservation and security of the building held in common during the period for which the rents were collected. And where the building contained theater rooms, which were let from time to time with the furniture thereof—as carpets, lamps and scenery—which furniture was the individual property of the tenant in possession, he is entitled, in the accounting, to a reasonable allowance, to be deducted from the rents, for the use of such furniture, when such use was required in order to let the premises themselves. But he is not entitled to allowances for the use of any individual property in connection with the premises not thus required, nor to any allowances for his personal services in taking charge of the building, renting the same, and collecting the rents. *Ib.*

PARTNERSHIP.

See COPARTNERSHIP.

PASSENGERS.

1. In an action against a common carrier for nonperformance of his contract to carry a passenger, remote and contingent damages cannot be recovered. *Yonge* v. *Pacific Mail S. S. Co.*, 1 Cal. 364.

2. The appellate court will not interfere

with the verdict of a jury where the question upon which they have passed is one solely of liquidated damages, unless beyond doubt the verdict be unjust and oppressive: so held in an action brought by a passenger against the owners of a steamer for not furnishing him with the conveniences during the voyage which the contract of conveyance required. *George* v. *Law*, 1 Cal. 365.

3. The act of 1855, imposing a tax of fifty dollars on every person arriving in this State by sea who is incompetent to become a citizen, is void. *People* v. *Downer*, 7 Cal. 171.

See COMMON CARRIERS.

PATENT.

1. The patent is a matter of evidence and description by metes and bounds, and its office is to make the description of the land definite and conclusive as between the United States and the State. *Owens* v. *Jackson*, 9 Cal. 324.

2. Immediately upon the passage of the act of Congress of September 28th, 1850, this State became the owner, with absolute power of disposition, of all the swamp lands within her limits, which had not been disposed of. The title of the State in no way depends upon a patent. The act itself operated as a conveyance. *Summers* v. *Dickinson*, 9 Cal. 555.

3. The governor, in issuing a patent to an individual of such lands, acts as the agent of the State, under powers conferred by the statute, and his authority extends only to such lands as were granted to the State by the act of Congress. *Ib.*

4. A patent from the governor, purporting to convey the lands of the State, can have no validity unless expressly authorized by law. *Ib.* 556.

5. Such a patent is prima facie evidence of title in the grantee, as the law presumes in favor of the acts of all public officers. *Ib.*

6. On the 21st of January, 1842, the Mexican government granted to the Indian chief, Francisco Solano, a tract of land called Suisun, covering four square leagues within exterior limits, embracing about eight leagues. On the 4th of March, 1840, the same government granted to Armijo a tract of land called Tolenas, covering three leagues within exterior limits, embracing from twelve to twenty leagues. The maps referred to in both grants cover the land in controversy. Upon final confirmation and survey, a patent was issued, January 18, 1857, by the United States, to Ritchie, successor in interest to Solano, for four leagues of land, with the specific description of the official survey by the United States. This patent covers the land in dispute. The grant to Armijo, from whom defendant traced title, was confirmed by the United States District court, and stands on appeal to the supreme court. Assuming that Armijo occupied and claimed from the entire quantity comprehended within the map referred to in his grant, three specific leagues covering the land in controversy: held, that the patent is conclusive against the defendant, unless he shows title superior to the patent, under a confirmed Spanish or Mexican grant, located under those governments, or under government of the United States. *Waterman* v. *Smith*, 13 Cal. 409; *Moore* v. *Wilkinson*, 13 Cal. 486.

7. When the patent issued upon land conflicts with prior rights of third parties, its conclusiveness is then maintained only so far as may be necessary for the protection of such prior rights. *Waterman* v. *Smith*, 13 Cal. 415.

8. The government having issued a patent to R. of a portion of the land included in the general tract designated in the grant to A., it does not lie in the mouth of the latter to complain, there still remaining of such general tract more than sufficient to satisfy the specific quantity granted to him. If the patentee accepted the land described on his patent as answering his claim, other persons cannot complain, even if a portion of the land thus taken was without the boundaries of his original claim. *Waterman* v. *Smith*, 13 Cal. 417; *Moore* v. *Wilkinson*, 13 Cal. 487.

9. The patent is only evidence of the pre-existing title made perfect by confirmation and survey. *Waterman* v. *Smith*, 13 Cal. 418.

10. The patent is conclusive evidence of the right of the patentee to the land

described therein, not only as between himself and the United States, but as between himself and a third person, who has not a superior title from a source of paramount proprietorship. *Waterman* v. *Smith*, 13 Cal. 419; *Moore* v. *Wilkinson*, 13 Cal. 487; *Yount* v. *Howell*, 14 Cal. 469; *Stark* v. *Barrett*, 15 Cal. 366.

11. The act of Congress (May 20th, 1836,) vesting the title of public lands patented to a person dead at the date of the patent, in "the heirs, devisees, or assigns of the deceased patentee," was intended to cover all cases where any rights belonging to the United States existed in lands which could be relinquished by patent, even though the lands were not strictly public lands. *Waterman* v. *Smith*, 13 Cal. 420.

12. Parties holding claims which may be located without the boundaries of the patent, and still within the limits of the general tract designated in the grants to them, do not constitute such third persons, nor do parties who hold claims only upon the bounty of the government, nor do intruders, nor even settlers, having certificates of sale, unless the same antedate the presentation of the claim of the patentee to the Board of Land Commissioners for California, to which period the patent takes effect by relation. *Waterman* v. *Smith*, 13 Cal. 420; *Moore* v. *Wilkinson*, 13 Cal. 488.

13. If settlers, after steps taken for confirmation, could by location acquire such rights to the premises as to authorize them to compel a patentee, in every suit for the recovery of his land, to establish the correctness of the action of the officers of government in their survey and location, the patent, instead of being an instrument of quiet and security to the possessor, would become a source of perpetual and ruinous litigation, and the settlement of land titles in the country be delayed a quarter of a century. *Moore* v. *Wilkinson*, 13 Cal. 488.

14. In ejectment on a patent issued upon a final decree of confirmation of land claimed under a Mexican grant, defendant cannot set up fraud in the survey, or the procurement of the patent, to defeat the action. If the defendant have vested rights so as to avail him against the assertion of any claim of the government respecting the premises in controversy, it would only follow that the patent was inoperative to that extent—not that it is void. The rights of the defendant would in that case be effectually protected by the provisions of the fifteenth section of the act of March 3d, 1851, and the patent would be like a second deed to premises previously granted, and pass as to the property, no interest. *Boggs* v. *Merced Mining Co.*, 14 Cal. 363; *Yount* v. *Howell*, 14 Cal. 469.

15. A patent from the United States proves itself. Courts take judicial notice of the signature of the president, and of the seal of the government. *Yount* v. *Howell*, 14 Cal. 467.

16. Where the complaint in ejectment avers that the land sued for is known by the name of "La jota," heretofore granted to plaintiff by the Mexican government, and the patent issued thereon refers to the grant, the proceedings before the land commission and the United States court for confirmation; these recitals in the patent support the averment of title through the grant. *Ib.*

17. The patent is in itself as against the government, evidence of the existence and validity of the grant recited in it, as well as of the relinquishment of all claim of the United States to the land it embraces. *Ib.*

18. A patent can have no greater effect upon the title than the judgment of the proper court; the patent would save the parties the necessity of proving anything beyond it, and limit the evidence in the case to matters arising upon mesne conveyances under the original grantee. But so far as the title is concerned, the boundaries of the land being given—its segregation, in other words, from the public domain, being made by the decree itself, nothing further could be required. *Natoma W. & M. Co.* v. *Clarkin*, 14 Cal. 551.

19. The eleventh section of the act of 1856, for the protection of actual settlers and to quiet land titles, only applies to actions brought to recover the possession of lands after the issuance of a patent. *Morton* v. *Folger*, 15 Cal. 284.

20. The patent, in recognizing the validity of the grant, necessarily establishes the validity of all properly executed intermediate tranfers of the grantee's interest. *Stark* v. *Barrett*, 15 Cal. 366.

21. The patent is the record of the

State that the land was subject to location under the grant of the United States, and has been located, through her officers, in pursuance of the terms of the donation; and as against parties who have no higher right than that which arises from mere occupation, it imports absolute verity. *Doll* v. *Meador*, 16 Cal. 324.

22. If a patent be void upon its face, it may be assailed at any time and in all cases, for it is itself record evidence of the matter which renders it a nullity. If it be issued in the absence of legislation directing a disposition of the property described, or by an officer who is not invested with power to sign the same, or for an estate prohibited, its validity may also be controverted in any action, either directly or collaterally; but if the authority to issue the patent depend upon the existence of particular facts in reference to the condition or location of the property, or the performance of certain antecedent acts, and officers have been appointed for the ascertainment of these matters in advance, who have passed upon them, and given their judgment—then the patent, though the judgment of the officers be, in fact, erroneous, cannot be attacked collaterally by parties showing title subsequently from the same source, much less by those who show no color of title in themselves. In such cases, the parties without title cannot be heard at all, and the parties with subsequent title must seek their remedy by *scire facias*, or bill, or information, to revoke the first patent, or limit its operation. *Ib.*

23. A patent not void upon its face cannot be questioned, either collaterally or directly, by persons who do not show themselves to be in privity with a common or paramount source of title. *Ib.* 325.

24. The defendants in this case stand in no privity with the United States, and possess no claim, legal or equitable, to the lands upon which they are settled—inasmuch as they failed to accept the proffered offer of the general government to invest them with title through the action of certain officers—and, therefore, cannot be heard in opposition to the patent which the plaintiff holds from the State of California. *Ib.* 326.

25. New States, under the act of September 4th, 1841, acquire their interest upon their admission into the Union, and may make selections of land before the survey of the United States—which selections are only subject to three qualifications: first, they must not be of lands reserved from sale by any law of Congress or the proclamation of the President; second, they must be in parcels of not less than three hundred and twenty acres each; and third, the parcels selected must be in such form as to correspond with the survey of the United States, when made. *Ib.* 331.

26. State selections will not become absolute and definite until the survey—until then, the parcels selected may be subject to a possible reservation from sale; and when there is no such reservation, they may require some change in their exterior lines, so as to conform to the official sectional divisions and subdivisions. In the legislation of the State, provision is made so as to secure such conformity. *Ib.*

27. In ejectment on a patent from the United States for land under a Mexican grant, in which patent there was incorporated a plat of survey, on the margin of which was a memorandum that the land was surveyed, under the orders of the United States surveyor general, by Von S., deputy surveyor, and that the field notes from which it was made had been examined and approved by the United States surveyor general for California, and were on file in his office, plaintiff offered the patent in evidence, and defendant objected to the survey it set forth, on the ground that the deputy surveyor who made it was interested in the grant: held, that the objection is untenable; that it is immaterial whether the deputy was, at the time, interested in the grant or not, as the approval of the survey by the surveyor general and by the proper department at Washington imparted validity to the survey, and put it beyond the reach of attack in actions of ejectment; that such approval was the judgment of the appropriate tribunal, that the survey was in conformity with the final decree of confirmation—this case having arisen previous to the act of Congress, of 1860, giving the district court supervision over the action of the surveyor general, etc. *Mott* v. *Smith*, 16 Cal. 548.

28. Where, in ejectment on a patent from the United States, reciting that the patentee had presented his claim to the board of land commissioners, and that the claim was founded on a Mexican grant made to Pablo Gutieras "in the summer

of 1844, by Captain John A. Sutter, who, according to the records of the board, derived his authority from Governor Micheltorena, on the twenty-seventh day of December, 1844," etc., it was objected to the introduction of the patent in evidence, that it rested on a grant from one who had no authority to grant: held, that even conceding Sutter had no such authority, still, the tribunals established by the United States government for the express purpose of ascertaining and determining the validity of grants claimed to have been issued by the Mexican government having passed upon this grant and pronounced it valid, its validity cannot be questioned, either by the government or by individuals claiming under the government, either collaterally in ejectment, or directly in any other form of proceeding; that the validity of the grant has become the law of the case. *Ib.*

See EJECTMENT, LAND.

PAYMENT.

1. Gold dust is not cash within the meaning of a contract calling for the payment of cash. *Gunter* v. *Sanchez*, 1 Cal. 46.

2. On a sale of chattels where no time of payment and no time for delivery are agreed upon, delivery and payment are concurrent acts; and neither party can maintain an action for nonperformance without showing a readiness and willingness to perform on his part. *Cole* v. *Swanston*, 1 Cal. 54.

3. A being indebted to B, delivered to him a quantity of lumber as security for payment of the debt, with the understanding that B. should proceed and sell the lumber and pay his debt out of the proceeds. The lumber was afterwards levied upon by the defendants under an execution in their favor against A, as his property: held, that the lumber was not subject to seizure under an execution against A, without payment in the first place of his indebtedness to B. *Swanston* v. *Sublette*, 1 Cal. 124.

4. Where it was agreed in a charter party that a vessel should be chartered for fifteen months, at $2,000 per month, and payments to be made semi-annually in New York city: held, that the owner of the vessel had lost his right of lien on the cargo for the nonpayment of the sum stipulated in the charter party. *Brown* v. *Hayward*, 1 Cal. 424.

5. A check is presumptive evidence of payment of a debt due and not of money loaned. *Headley* v. *Reed*, 2 Cal. 324.

6. The principle that a liability by a less sum than the amount due applies to payment in money, and has never been extended to a case where merchandise or property in goods was accepted in satisfaction. *Gaven* v. *Lord*, 2 Cal. 497.

7. If a payment be made in mistake of law and not of fact, the court cannot relieve the party. *Smith* v. *McDougal*, 2 Cal. 587.

8. A payment to the sheriff for the redemption of land sold cannot be made in certified checks. *People* v. *Hays*, 4 Cal. 152.

9. Plaintiff having protested against the sale, purchased the property in order to protect it from a clouded title, made the payment under protest, and in a few days after commenced suit for the recovery of the money: held, that this was sufficient notice to the officer to hold the fund, and fixes his liability. *Hays* v. *Hogan*, 5 Cal. 242.

10. Receipts executed by a third party acknowledging the payment of money, are but secondary evidence, as the party executing them is a competent witness to prove the payments, or any other person who saw the payments made. *Ford* v. *Smith*, 5 Cal. 314.

11. In an action for contribution between joint obligees, the statute of limitations does not begin to run until after the payment of the debt by the plaintiff, *Sherwood* v. *Dunbar*, 6 Cal. 54.

12. Where the payment was made by plaintiff by a settlement of accounts with the payee of the note, the statute only begins to run from the date of the appropriation of money due by the payee to the plaintiff, to the payment of the note. *Ib.*

13. A payment to a clerk of a banking house over the counter is a legal payment, by which the payor loses all control over the money, nor is it vitiated by a subsequent agreement by the payor with the clerk, to allow the latter to use the money *Rhodes* v. *Hinckley*, 6 Cal. 284.

14. When a draft is accepted conditionally, to be paid upon the happening of a contingency, whether the contingency has happened is a question for the jury. *Nagle* v. *Homer*, 8 Cal. 358.

15. A draft payable in terms out of an "appropriation" for work done by the acceptor, becomes due on payment for the work by government. *Ib.*

16. A executed a note and mortgage to B. Subsequently A and B entered into partnership in the livery business. A was to furnish the stable, hay and grain, and board B, and B. was to attend the stable, the profits to be equally divided, and the share of A was to be applied in discharge of the note. B. received the sum of three hundred and ninety-six dollars, as share of the profits of the business, and then after maturity assigned the note and mortgage to C. C. brought suit against A for the whole amount. A plead payment and set-off: held, that A was entitled to the credit of the payment. *Mount* v. *Chapman*, 9 Cal. 296.

17. Where money is paid upon compulsion, the law raises an obligation to refund, and the action is for money had and received to the plaintiff's use. *McMillan* v. *Richards*, 9 Cal. 418.

18. The object of a protest is to take from a payment its voluntary character, and thus conserve to the party a right of action to recover back the money. *Ib.*

19. A bill in equity may be filed and an injunction obtained in advance forbidding the sheriff from paying over the money which the creditor might pay to effect the redemption, until the further order of the court of chancery. *Ib.* 420.

20. There is no such rule of law which prevents a debtor in insolvent circumstances from the application of his property to the payment of one debt rather than another. *Randall* v. *Buffington*, 10 Cal. 494.

21. Defendants were indebted to plaintiff in the sum of $10,000. Subsequently parties had a settlement, and defendants gave to plaintiff, in part payment of the debt, a note of third parties for $2,500, which was received by plaintiff without objection, and the same left with defendants for collection. The note was not paid at maturity, and plaintiff demanded the amount for which the note was taken in settlement of the defendants, who paid $1,200 and gave to plaintiff another note of same parties for the balance, payable in one year: held, in an action by plaintiff against the defendants to recover the balance, that defendants are liable for the amount. *Griffith* v. *Grogan*, 12 Cal. 321.

22. Unless the note was received by express agreement as payment, it did not extinguish the debt; it only operated to extend the time of payment of the debt to the time the note fell due, and hence the statute of limitations would commence running only from that time. *Ib.* 222.

23. The acceptance of a note of a third party by the creditor is considered as accompanied with the condition that the note shall be paid at its maturity. *Ib.*

24. The obligation of the debtor to pay in such case does not rest upon notice by the creditor of the nonpayment of the note, but upon the fact that the note was not paid; and hence delay on the part of the creditor in calling on the debtor will not absolve him from his obligations to pay. *Ib.*

25. A part payment of a demand by one of two debtors will not discharge such debtor making the payment from the payment of the balance. This obligation is to pay the whole. *Ib.*

26. Nothing is to be considered as payment in fact but that which is in truth such, unless something else is expressly agreed to be received in its place. *Ib.*

27. Where a redemptioner under the statute pays to the sheriff an excess of money under protest as to the excess, the payment is not compulsory and the redemptioner may recover it back on demand. *McMillan* v. *Visher*, 14 Cal. 240.

28. If the debtor at the time of or previous to payment neglects to designate to which of several debts he applies his payment, his right to control the application is gone, and the creditor may exercise it at any time before suit. *Haynes* v. *Waite*, 14 Cal. 448.

29. The institution of suit evidences the creditor's application of the payment. *Ib.*

30. As a security for a debt, default in the payment of a mortgage does not change its character. Payment after default operates to discharge the lien equally with payment at the maturity of the debt. *Johnson* v. *Sherman*, 15 Cal. 293.

31. Where bonds were issued as a payment of warrants which had been stolen,

they cannot be recovered back, and if the rule that voluntary payments are not recoverable be not applicable, still the equity of the defendants is equal to that of plaintiff, and courts will not interfere. *State of California* v. *Wells*, 15 Cal. 344.

32. The State, being in default in making the monthly payments under the State prison contract as they became due, and for months previous to this suit refusing to pay at all; not offering to make restitution of the property received of the lessee or pay the value of the claims relinquished by him at the execution of the contract, or to pay what the complaint shows to be now due; and it not being possible to restore Estill and McCauley to their original position, they having been in possession of the prison for nearly three years and having performed valuable services, cannot claim in equity a rescission of the contract. *State of California* v. *McCauley*, 15 Cal. 458.

33. To an appropriation within the meaning of the Constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury. *People* v. *Brooks*, 16 Cal. 28.

34. The provision in the constitution, "that no money shall be drawn from the treasury, but in consequence of appropriations made by law," means only that no money shall be drawn except in pursuance of law. *Ib.*

35. The act of April 13th, 1854, amendatory of the act concerning the office of controller, and providing that no warrants shall be drawn except there be "an unexhausted, specific appropriation" to meet the same, means only that the controller shall not draw a warrant for a specific object, when he has already drawn for the full amonnt of the appropriation made for that object. *Ib.*

36. Under the mechanic's lien act of 1856, material-men, subcontractors, etc., have a lien upon the property described in the act to the extent—if so much be necessary—of the contract price of the principal contractor; but they must give notice of their claims to the owner, or the mere existence of such claims will not prevent the owner from paying the contractor, and thereby discharging himself from the debt. By giving such notice, the owner becomes liable to pay the subcontractor, material-men, etc., as on garnishment or assignment; but if the owner pay according to his contract, in ignorance of such claims, the payment is good. *McAlpin* v. *Duncan*, 16 Cal. 127.

37. Taxes not justly due and paid under protest may be recovered back under suit against the tax collector. *Falkner* v. *Hunt*, 16 Cal. 170.

38. A mere stranger who voluntarily pays money due on a mortgage, and fails to take an assignment thereof, but allows it to be canceled and discharged, cannot afterwards come into equity, and, in the absence of fraud, accident or mistake of fact, have the mortgage reinstated and himself substituted in the place of the mortgagee. *Guy* v. *Du Uprey*, 16 Cal. 198.

PENALTY.

1. An action founded upon a statute to recover a penalty, where no penalty is imposed by the statute, cannot be sustained. *Board of Health* v. *Pacific Mail S. S. Co.*, 1 Cal. 198.

2. It is not necessary in an action against a sheriff to recover damages (in addition to the two hundred dollars imposed by law as a penalty) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit. *Pearkes* v. *Freer*, 9 Cal. 642.

3. Where a telegraph company fails to transmit a message upon compliance by the person contracting with it with the conditions required by section one hundred and fifty-four of the act of 1850, an action for the penalty given by the act lies in favor of such person. *Thurn* v. *Alta Telegraph Co.*, 15 Cal. 475.

4. The sum to be so recovered is a penalty for a breach of the duty to transmit the message, and the act is in this section a penal law to be strictly construed. *Ib.*

5. The person entitled to recover the penalty is the party who contracts or offers to contract for the transmission of the despatch. *Ib.*

PERJURY.

1. An indictment for perjury, charging that the accused in a certain proceeding, describing it, "did willfully, corruptly, and falsely swear," etc., but not alleging that the perjury was committed "feloniously," is sufficient. *People* v. *Parsons*, 6 Cal. 488; *People* v. *Olivera*, 7 Cal. 404.

2. A conviction for perjury cannot be sustained without the false oath be material to the issue, and therefore prejudicial to some one; otherwise, however willful, it cannot be perjury. *People* v. *McDermott*, 8 Cal. 290.

3. Demurrer to an indictment for perjury being sustained, the district attorney took no exception, but moved for and obtained an order submitting the case to another grand jury. Subsequently the people appealed from the order sustaining the demurrer: held, that the failure to except and taking this order was an acquiescence in the judgment on demurrer, and a waiver of any right to appeal. *People* v. *Wooster*, 16 Cal. 435.

See CRIMES AND CRIMINAL LAW, INDICTMENT.

PERPETUITY.

1. A covenant for a lease to be renewed indefinitely at the option of the lessee, is in effect the creation of a perpetuity, and is against the policy of the law. *Morrison* v. *Rosignol*, 5 Cal. 65.

PERSON.

1. The word "person," in its legal signification, is a generic term, and was intended to include artificial as well as natural persons. *Douglass* v. *Pacific Mail S. S. Co.*, 4 Cal. 306; *San Francisco Gas Co.* v. *City of San Francisco*, 9 Cal. 467.

See PARTIES.

PHYSICIAN.

1. In a suit by a physicion against a county, on a contract for services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless the demurrer distinctly present the objection. *McDaniel* v. *Yuba County*, 14 Cal. 445.

2. If after such contract which compels the physician to perform such services only as the supervisors might require, they put it out of his power to render the services, he is still entitled to his salary. *Ib.*

See INSANE ASYLUM.

PILOT.

1. When a vessel is properly in charge of a licensed pilot, the owner is not liable for damages which may ensue from the negligence or misconduct of the pilot, but the owner is not exempt from liability for injuries committed by taking an improper berth in the harbor, although it may have been selected by the pilot. *Griswold* v. *Sharpe*, 2 Cal. 24.

2. Pilots are appointed by virtue of an act of the legislature; have a fixed term to their employments; have definite duties prescribed; fixed rates of compensation; are required to give bond, and are entitled to all the business of pilots for the harbor of San Francisco. They are subject to penalties for misfeasance or malfeasance, and are protected by law in the enjoyment of their offices and emoluments. *People* v. *Woodbury*, 14 Cal. 45.

3. Quo warranto lies to test the right of a pilot to the office as appointed by the board of pilot commissioners. *Ib.*

4. In quo warranto for the alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, usurp and enjoy the office without a license, and also contains allegations as to the right of relator to hold the office: held, that these al-

legations as to relator's right, cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office. *People* v. *Abbott*, 16 Cal. 364.

5. The act of April 21st, 1860, relative to pilots in the port of San Francisco, did not legislate out of office pilots licensed under acts repealed by the act of April 21st, whose term of office had not expired when this act went into operation. *Ib.* 365.

6. The title of an act cannot be used to restrain or control any positive provision of the act, but where the meaning of the body of the act is doubtful, the title may be resorted to as a means of ascertaining the intention of the legislature. *Ib.* 365.

PILOT COMMISSIONERS.

1. The board of pilot commissioners is a quasi judicial body, entrusted with duties, the performance of which requires the exercise of judgment and discretion; and its members are not civilly answerable for their acts as such. *Downer* v. *Lent*, 6 Cal. 95.

2. The Board of pilot commissioners under the act of 1854 as amended by the act of 1858, have only the powers conferred by the act, and must appoint the pilots from all classes of persons named therein. They cannot appoint a man as pilot who has not served two years on a pilot boat in the harbor, or commanded a vessel in and out of port for three years. *People* v. *Woodbury*, 14 Cal. 45.

See OFFICE, PILOT.

PLACER COUNTY.

1. The special act of the legislature, approved April 4th, 1857, fixing the compensation of the county clerk of the county of Placer at $3,000, was intended in lieu of all services rendered the county. *Mitchell* v. *Stoner*, 9 Cal. 204.

PLAINTIFF.

1. An agent cannot ordinarily sue in his own name in respect to the subject matter of his own agency, and this rule applies to consignees and endorsers of bills of lading unless they are in truth but the agents of the shippers. *Lineker* v. *Ayesford*, 1 Cal. 82.

2. A sheriff who levies an attachment by virtue of the process of the court has not the right of property in the debt, and cannot maintain an action in his own name for the recovery of the debt. *Sublette* v. *Mulhado*, 1 Cal. 105.

3. In an action of ejectment brought by several plaintiffs jointly, all must recover or none can. *Sinol* v. *Hepburn*, 1 Cal. 260.

4. The plaintiff always, in contemplation of law, has the affirmative and the right to open and conclude the cause. *Benham* v. *Rowe*, 2 Cal. 408.

5. Where suit is brought upon a bill of lading made to the plaintiff jointly with another, the plaintiff has no separate cause of action. *Mayo* v. *Stansbury*, 3 Cal. 467.

6. A principal may sue in his own name on a contract in writing, made and signed by his agent without disclosing his principal, but the principal must show the agency and the power of the agent to bind him at the time. *Ruiz* v. *Norton*, 4 Cal. 358.

7. H. purchased goods of P. & M., which were consigned to P., an agent. H. failing to pay for the goods on delivery, P. brought an action to recover the purchase money: held, that P. had no right of action in his own name. *Phillips* v. *Henshaw*, 5 Cal. 510.

8. A plaintiff or defendant cannot be permitted to testify on the part of his coplaintiff or defendant. *Gates* v. *Nash*, 6 Cal. 194; *Lucas* v. *Payne*, 7 Cal. 96; *Turner* v. *McIlhaney*, 8 Cal. 579.

9. The want of capacity in the plaintiff to sue should be specifically set up in the answer. The general issue is not sufficient. *California Steam Navigation Co.* v. *Wright*, 8 Cal. 590.

10. It is no ground of demurrer to a complaint that the christian name of one of the plaintiffs does not appear. *Nelson* v. *Highland*, 13 Cal. 75.

11. On an injunction bond given to plaintiff and others as obligees, plaintiff alone may sue, if the property on which the injunction operated was his sole property, and the injury his alone, the complaint averring these facts. *Browner* v. *Davis*, 15 Cal. 11.

12. In an action by the wife for money, which, when recovered, will be her separate property, subject to the management and control of the husband, he is properly joined with her as plaintiff. *Van Maren* v. *Johnson*, 15 Cal. 310.

13. The duty imposed by the forty-ninth section of the revenue act of 1857, for selling goods at public auction, is not a tax on the auctioneer, but a tax on the sale of goods, or the proceeds of the sale—the auctioneer being made the collector of the State for the amount of the tax. This duty may be collected by action of debt by the State against the auctioneer; and the penal remedy afforded by the fifty-second section of the act is not an exclusive remedy. This suit not being a prosecution but a civil action for the recovery of money due the State, is properly brought in the name of the State. *State of California* v. *Poulterer*, 16 Cal. 532.

PLEADING.

1. Pleadings must be construed, when they are ambiguous, most strongly against the pleader. *Snow* v. *Halstead*, 1 Cal. 361; *Chipman* v. *Emeric*, 5 Cal. 51; *Kashaw* v. *Kashaw*, 3 Cal. 322; *Green* v. *Covillaud*, 10 Cal. 322; *Dye* v. *Dye*, 11 Cal. 167; *Sparks* v. *De la Guerra*, 14 Cal. 111; *Collins* v. *Butler*, 14 Cal. 227.

2. Great latitude is given to the courts, in our statute, in amending and altering pleadings. *Pollock* v. *Hunt*, 2 Cal. 194; *Stearns* v. *Martin*, 4 Cal. 229.

3. The verdict must be confined to the matter put in issue by the pleadings. *Benedict* v. *Bray*, 2 Cal. 256; *Truebody* v. *Jacobson*, 2 Cal. 285.

4. A contract contained a covenant of stipulated damages, and by the same contract the parties were constituted partners: it was held, that in an action on the contract, the legal demand for damages could be joined with the equitable demand for a dissolution. *Stone* v. *Fouse*, 3 Cal. 294.

5. A copartnership contract contained a covenant also for damages: it was held that one partner could not sue the other for the damages without seeking an account and a dissolution. *Ib.*

6. Pleadings must be strongly taken against the pleader, and in the absence of an allegation the presumption is that the fact does not exist. *Kashaw* v. *Kashaw*, 3 Cal. 322.

7. Where a bill disclosed that the same subject matter has been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was ordered to be dismissed. *Barnett* v. *Kilbourne*, 3 Cal. 327.

8. The allegation of ignorance in making the necessary averments, or of insufficient conduct in the prosecution of a former suit, does not constitute ground of relief in chancery. *Ib.*

9. A plaintiff may waive a tort, and sue in assumpsit or for an account if he prefer it. *Lubert* v. *Chauviteau*, 3 Cal. 462; *Fratt* v. *Clark*, 13 Cal. 90.

10. The distinctions in the form of actions ex delicto and ex contractu was abolished by statute; but the general principles which govern such actions are retained. *Lubert* v. *Chauviteau*, 3 Cal. 463.

11. Assumpsit on the condition of a bond would be held bad on demurrer. *Baker* v. *Cornwall*, 4 Cal. 16.

12. Where a party alleges assignment to him of a contract made with another, he must aver a positive transfer and the character of it. *Stearns* v. *Martin*, 4 Cal. 229.

13. Matters in avoidance must be specially pleaded. They cannot be used as defenses under an answer which is a simple denial of the allegations of the bill. *Gaskill* v. *Trainer*, 4 Cal. 235.

14. Under the code it is competent for the plaintiff to recover real property, with damages for withholding it, and the rents and profits, all in the same action and as one cause of action. *Sullivan* v. *Davis*, 4 Cal. 292.

15. A party ought not to be allowed the

benefit of any proceeding unless he assumes the responsibility of it. *Douglass* v. *Pacific Mail S. S. Co.*, 4 Cal. 305.

16. The word "person" in the code of practice is a generic term, and was intended to include artificial as well as natural persons, corporations as well as individuals. *Ib.: San Francisco Gas Co.* v. *City of San Francisco*, 9 Cal. 467.

17. We are not disposed to encourage nice or technical rules of pleading, but we desire something like certainty, and that the bar would conform as near as possible to the requirements of the code. *Mershon* v. *Randall*, 4 Cal. 326.

18. The substitution of pleadings is always within the discretion of the court, and notice of the motion to apply for it need not be given when the notice can be of no use. *Benedict* v. *Cozzens*, 4 Cal. 382.

19. An action may be brought by one person against another, for the purpose of determinining an adverse claim which the latter makes against the former for money or property, upon an alleged obligation. *King* v. *Hall*, 5 Cal. 84.

20. A court of equity will not permit litigation by piecemeal. The whole subject matter and all the parties should be before it, and their respective claims determined once and forever. *Wilson* v. *Lassen*, 5 Cal. 116,

21. Under our system it is only necessary that the cause of indebtedness should be stated in such a manner as to apprise the defendants of the object of the suit. *Mulliken* v. *Hull*, 5 Cal. 246.

22. Notwithstanding our statute has dispensed with the old form of pleading, and it is no longer necessary to allege a fictitious demise, still, facts sufficient must be pleaded to show the plaintiff's right to recover, and it will not do to state conclusions of law in place thereof. *Payne* v. *Treadwell*, 5 Cal. 311.

23. Though a plea would be good on demurrer, yet if no objection be taken at the time, and the case be submitted to a referee, the defect of the plea is not sufficient reason to set aside the report. *Osgood* v. *Davis*, 5 Cal. 454.

24. For the furtherance of justice, courts should allow pleadings to be amended, so as to present a question of fraud to the jury when the defendant has been arrested, that the question may be submitted to the jury and a judgment be entered in conformity to the facts found. *Matoon* v. *Eder*, 6 Cal. 61; *Davis* v. *Robinson*, 10 Cal. 412.

25. Where the complaint in an action of trespass asks also for the equitable interpositions of the court, if the law and equity are inseparably mixed together, it would be demurrable; but it is not necessary that there should be express words, showing where the declaration in trespass leaves off, and the bill in equity begins. *Gates* v. *Kieff*, 7 Cal. 125.

26. A complaint which joins an action of trespass "quare clausum fregit," ejectment and prayer for relief in chancery, will be held bad on demurrer. To sustain such a complaint would be subversive of all the rules of pleading. *Bigelow* v. *Gove*, 7 Cal. 135.

27. No court could properly sustain a pleading or uphold a kind of hybrid answer, half demurrer and half plea, with nothing to designate where the one left off and the other commenced. *Andrews* v. *Mokelumne Hill Co.*, 7 Cal. 334.

28. Under no system of pleading will alternative or disjunctive allegations be permitted. *Porter* v. *Hermann*, 8 Cal. 624.

29. In forcible entry and detainer, when the title becomes involved, the justice must certify the pleadings to the district court. *Dickinson* v. *Maguire*, 9 Cal. 50.

30. Under a plea of general issue, evidence of a counter claim is not admissible, but should be specially plead. *Hicks* v. *Green*, 9 Cal. 75.

31. The code makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons. *San Francisco Gas Co.* v. *City of San Francisco*, 9 Cal. 467.

32. The test of the materiality of an averment in a pleading is this: Could the averment be stricken from the pleading without leaving it insufficient? *Whitwell* v. *Thomas*, 9 Cal. 500.

33. When a pleader assumes to set out the particulars of his case, he must be held to have done so. *Low* v. *Henry*, 9 Cal. 551.

34. The code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defense. *Piercy* v. *Sabin*, 10 Cal. 27.

35. The plaintiff is compelled to set out every fact necessary to constitute his

cause of action, and the defendant every new matter of defense. This is required by the true principles of pleading. *Ib.*

36. The statute has not altered any of the ordinary rules of pleading for cases for divorce, except that nothing can be taken by admission or default. *Conant* v. *Conant*, 10 Cal. 254.

37. The defendants cannot object to a pleading as it stands, when they refused to permit it to be amended to suit their own views of the law. *Summers* v. *Farish*, 10 Cal. 352.

38. When a pleader wishes to avail himself of a statutory privilege or right given by particular facts, he must show the facts. *Dye* v. *Dye*, 11 Cal. 167.

39. Common counts, in the usual form adopted under the old system of pleading, are good in actions against private persons. *Hunt* v. *City of San Francisco*, 11 Cal. 258.

40. The fact that, by reason of one count having been imperfectly stated, no judgment could be rendered on that count, does not affect the right of plaintiff to take judgment on those which are rightly stated. *Ib.* 259.

41. Where personal property is tortiously taken, the party aggrieved may waive the tort, and sue in assumpsit for the value of the property. *Fratt* v. *Clark*, 12 Cal. 90.

42. The old rules of chancery pleading are superseded by the practice act. *Cordier* v. *Schloss*, 12 Cal. 147.

43. The code governs all cases of pleading, legal and equitable, by the same rules. *Goodwin* v. *Hammond*, 13 Cal. 169; *Riddle* v. *Baker*, 13 Cal. 302; *Payne* v. *Treadwell*, 16 Cal. 243.

44. Pleadings in justices' courts are not held to much strictness. *Liening* v. *Gould*, 3 Cal. 599; *Stuart* v. *Lander*, 16 Cal. 374.

45. Though a pleading is not strictly proof for the party making it, still a complaint may be read to the jury to show what allegations are not denied, and hence admitted. *Garfield* v. *Knight's Ferry and Table Mountain Water Co.*, 14 Cal. 36.

46. An appeal will be dismissed when the record contains no copy of the pleadings. *Hart* v. *Plum*, 14 Cal. 152.

47. A court cannot properly, even upon consent of parties, pass upon questions not raised by the written allegations of the pleadings. *Boggs* v. *Merced Mining Co.*, 14 Cal. 356.

48. The object of sworn pleadings is to elicit the truth, and this object must be entirely defeated if the same fact may be denied and admitted in the same pleading. *Hensley* v. *Tartar*, 14 Cal. 509; *Blankman* v. *Vallejo*, 15 Cal. 644.

49. The rules of pleading under our system of practice are very simple, and can be readily followed; yet we find in numerous instances before us, pleadings filled with recitals, digressions and stories which only tend to prolixity and obscurity. *Green* v. *Palmer*, 15 Cal. 414; *Coryell* v. *Cain*, 16 Cal. 571.

50. Facts only must be stated in the complaint, as contradistinguished from the law, from argument, from hypothesis and from the evidence of the facts. *Ib.*

51. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. *Green* v. *Palmer*, 15 Cal. 415.

52. Nothing should be stated which is not essential to the claim or defense, or in other words, that none but issuable facts should be stated. If this be violated, the adverse party may move to strike out the unessential parts. *Ib.* 416.

53. All statements in pleadings must be concisely made, and when once made, must not be repeated. *Ib.* 417.

54. The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn bill, in substance and in spirit, and not merely a denial of its literal truth; and wherever the defendant fails to make such denial he admits the averment. *Blankman* v. *Vallejo*, 15 Cal. 644.

55. There is but one form of civil actions in this State, and all the forms of pleadings and the rules by which their sufficiency is to be determined, are prescribed by the practice act. *Payne* v. *Treadwell*, 16 Cal. 243.

See ABATEMENT, ACTIONS, ACTIONS JOINDER OF, ADMISSIONS, III, AMENDMENT, ANSWER, APPEARANCE, AVOIDANCE, BAR PLEA IN, COGNOVIT, COMPLAINT, CONCILIATION, DEFAULT, DEMURRER, DISCONTINUANCE, ELECTION, DOCTRINE OF, ITEMS BILL OF, JUSTICE OF THE PEACE, III, PRACTICE, PUIS DARREIN CONTINUANCE, VARIANCE.

PLEDGE.

1. A party by pledging negotiable securities transferable by delivery, loses all right to the securities when transferred by the pledgee in good faith to a third party. *Coit* v. *Humbert*, 5 Cal. 261.

2. The pledgee in such a case should be treated in the transaction as the agent of the owner, and the owner should be bound by his acts in the premises. *Ib.* 262.

3. The purchase of property by a factor in his own name makes him to all the world the apparent owner, and as far as affects the rights of third persons his power is unlimited. He has the right to pledge. *Leet* v. *Wadsworth*, 5 Cal. 405.

4. A factor has no right to pledge goods when his only business is to sell goods consigned to him for that purpose wherefore, on account of his notorious employment, all the world is charged with notice that the goods in his possession are the property of others, and that he has power to sell them and no power to pledge them. *Hutchinson* v. *Bours*, 6 Cal. 385.

5. A pledge is a bailment which is reciprocally beneficial to both parties, and therefore the law requires of the pledgee the exercise of ordinary diligence in the custody and care of the goods pledged, and he is responsible for ordinary negligence. *St. Losky* v. *Davidson*, 6 Cal. 647.

6. When the bailors agreed that the goods pledged should be stored in a certain warehouse at their risk and expense: held, that their removal by an agent of the bailees, though without their knowledge, charged them for safe keeping of the goods after their removal, and that they were responsible for any damage to said goods caused by their removal to an insecure or improper place of storage. *Ib.*

7. When there is nothing in the business of consignees to make them technical factors, third parties are not bound to know that they acted as factors in pledging particular goods. *Glidden* v. *Lucas*, 7 Cal. 29.

8. A mortgage of personal property passes the present legal title in the property itself to the mortgagee, subject to be revested in the mortgagor, his heirs or assigns, upon the performance by him or them of an express condition subsequent. *Dewey* v. *Bowman*, 8 Cal. 150.

9. Where a negotiable promissory note not yet due is taken bona fide, as collateral security for a preëxisting debt, it is not subject to any defense existing at the date of the assignment between the original parties. *Payne* v. *Bensley*, 8 Cal. 267; *Robinson* v. *Smith*, 14 Cal. 48; *Naglee* v. *Lyman*, 14 Cal. 454.

10. A pledge of personal property is a "mortgage" within the meaning of the attachment act, the word being there used in the most general signification, meaning "security." *Payne* v. *Bensley*, 8 Cal. 267.

11. The rule that a factor cannot pledge the goods of his principal is in that case confined to technical factors, when the rights of third parties are involved. *Horr* v. *Barker*, 11 Cal. 402.

12. At one time seven shares of stock in a company were pledged by defendant to plaintiff as security for a note of defendant then executed. At another time twenty more shares were pledged as security for another note of defendant then executed. In suit on the notes and for sale of the stock, etc., the judgment was for the amount of the notes, and directed a sale of all the shares of stock and an application of the proceeds to the payment of the judgment: held, that the judgment was wrong so far as it ordered a sale of the stock in gross and an application of the proceeds to the entire indebtedness. *Mahoney* v. *Caperton*, 15 Cal. 315.

See DELIVERY, MORTGAGE, STATUTE OF FRAUDS.

POSSESSION.

I. Of Real Estate.
II. Of Personal Property.
III. Abandonment of Possession.

I. OF REAL ESTATE.

1. A person cannot be dispossessed of his property under an order of court proceeding ex parte on the statement of the plaintiff, and without citation or notice of the defendant. *Ladd* v. *Stevenson*, 1 Cal. 22.

2. In the action for the recovery of

land, if the plaintiff prove no title, the defendants being in possession, cannot be ousted; but if the defendants have entered into possession, claiming under the plaintiff, and in subordination to his title, they are estopped from questioning it. *Hoen* v. *Simmons*, 1 Cal. 121.

3. Where a contract is made to convey land by a quitclaim deed, at a future time, an action cannot be maintained by the vendee against the vendor, on the ground that a third person had intruded upon a portion of the land, and the vendee cannot obtain possession, there being no stipulation in the contract that the vendee shall be put in possession. *Tewksbury* v. *Laffan*, 1 Cal. 130.

4. Nor can such action be sustained on the ground that the vendor, long after the execution of the contract, gave the vendee a certificate to that effect, that at the time of making the agreement he consented and agreed that the vendee should take possession of the lot forthwith. *Ib.*

5. One who is in the actual possession of land cannot by process of law be ousted by another who has neither title nor color of title. *Suñol* v. *Hepburn*, 1 Cal. 259.

6. The fact that horses and cattle of a person have roamed over and grazed upon a particular tract of land does not of itself alone make out his actual possession of the land. *Ib.* 260.

7. If the plaintiff was not in possession at the time of the defendant's entry, he cannot maintain ejectment. *Ib.*

8. When the plaintiff seeks to recover upon the sole ground of prior possession, a clear and unequivocal possession should be proven. Taking possession and driving some surveyor's stakes and clearing away some brush for the purpose of erecting a dwelling house, but performing no other acts of ownership at that or any other time, are insufficient evidences of possession. *Woodworth* v. *Fulton*, 1 Cal. 310.

9. Courts will proctect the rights of the actual possessors, and if the complaint avers possession by the plaintiff and is not denied by the answer, it will be assumed by the court as a conceded fact. *Folsom* v. *Root*, 1 Cal. 376.

10. A lot of land in the harbor of San Francisco, lying within the line of streets as laid down and recognized by the city on its official map, and being in the actual possession of a person who claims to be the owner, cannot be taken from him and appropriated to the public use without paying him a just compensation. *Gunter* v. *Geary*, 1 Cal. 465.

11. After the purchase of land by a party at sheriff's sale, he has the right to sue for his possession; and the discovery of a fraud after suit brought would entitle him so to shape his action as to include it for the consideration of the court. *Truebody* v. *Jacobson*, 2 Cal. 284.

12. Possession is always prima facie evidence of title, and proof of prior possession is enough to maintain ejectment against a mere naked trespasser. *Hutchinson* v. *Perley*, 4 Cal. 34; *Hicks* v. *Davis*, 4 Cal. 69; *Winans* v. *Christy*, 4 Cal. 78; *Plume* v. *Seward*, 4 Cal. 96; *McMinn* v. *Mayes*, 4 Cal. 210; *Bequette* v. *Caulfield*, 4 Cal. 278; *Ramirez* v. *Murray*, 4 Cal. 293; *Norris* v. *Russell*, 5 Cal. 250; *Grover* v. *Hawley*, 5 Cal. 486; *Covillaud* v. *Tanner*, 7 Cal. 39; *McCarron* v. *O'Connell*, 7 Cal. 153; *Bird* v. *Dennison*, 7 Cal. 302; *Merced Mining Co.* v. *Fremont*, 7 Cal. 302; *Bird* v. *Lisbros*, 9 Cal. 5; *Nagle* v. *Macy*, 9 Cal. 427.

13. To constitute a possession sufficient to establish prima facie evidence of title, there must be an actual bona fide occupation or possessio pedis, and not a mere assertion of title. *Plume* v. *Seward*, 4 Cal. 96.

14. In actions of forcible entry and detainer, the statute does not require an allegation of possession by the plaintiff. *Cronise* v. *Carghill*, 4 Cal. 122.

15. It is not for the jury to determine whether the fact of prior possession is evidence of title; it is so declared by law. *Castro* v. *Gill*, 5 Cal. 42.

16. A party's possession is not always confined to his actual enclosure. *Ib.*

17. Proof of possession, however short, will entitle a claimant to recover, unless the defendant can account for such possession, or show a prior possession or title in himself or a third person. *Potter* v. *Knowles*, 5 Cal. 88.

18. Where two parties rely upon possession merely as proof of title, the presumption of ownership is in favor of the first possessor. *Ib.*

19. To sustain an action of ejectment in favor of a party relying upon mere prior possession, the defendant in the ac-

tion is treated as an intruder and wrong doer, who invades without right in the premises. *Mc Clintock* v. *Bryden*, 5 Cal. 101.

20. Where the plaintiff claimed title to the premises as part of a preëmption claim located by him, he must prove an enclosure of, or marked and visible boundaries embracing the lot in dispute. *Larue* v. *Gaskins*, 5 Cal. 166.

21. A claim for the possession of real property, with damages for its detention, cannot be joined in the same complaint under any system of pleading with a claim for consequential damages arising from a change of a road, by which a tavern-keeper may have been injured in his business. *Bowles* v. *Sacramento Turnpike and Plank Road Co.*, 5 Cal. 225.

22. Prior possession is evidence of title, and this cannot by any system of reasoning be made to yield to mere color of title. *Norris* v. *Russell*, 5 Cal. 250.

23. The occupant of mineral land may rely upon his possession against a mere trespasser, unless he uses the land for grazing or agricultural purposes. *Fitzgerald* v. *Urton*, 5 Cal. 309.

24. The right of enjoyment of possession to public lands may descend among the effects of a deceased person to the executor or administrator, and the right of the deceased be conveyed by a regular sale to another. *Grover* v. *Hawley*, 5 Cal. 486.

25. To enable the plaintiff in ejectment to recover on prior possession, he must allege and prove an actual ouster. *Watson* v. *Zimmerman*, 6 Cal. 47.

26. In cases of forcible entry, what is an actual and what a constructive possession, in many cases, must be a question of fact for the jury. *O'Callaghan* v. *Booth*, 6 Cal. 65.

27. In an action for the recovery of a portion of a tract of land, both parties relying on possession, and the defendant proving a prior possession by actual enclosure of the entire tract, it was error to instruct the jury that the defendant's possession was not valid, unless in conformity with the preëmption laws of the United States or the possessory law of this State. *Bradshaw* v. *Treat*, 6 Cal. 172.

28. Possession gives title only by presumption; then when the possession is shown to be of public land, why may not any one oust the possessor? Why can the latter protect his possession? Only upon the doctrine of presumption, for a license to occupy from the owner will be presumed. *Conger* v. *Weaver*, 6 Cal. 557.

29. Where a plaintiff in ejectment seeks to recover upon prior possession, and does not show a compliance with the statute concerning possessory actions in this State, he can only recover upon proof of actual bona fide occupation. *Murphy* v. *Wallingford*, 6 Cal. 649.

30. Possession is not constructive notice of title, but it may be admitted in evidence along with other facts to establish fraud or actual notice. *Stafford* v. *Lick*, 7 Cal. 489.

31. Parties in possession of land, claiming title thereto, are presumed to be the owners thereof, and are entitled to compensation before it can be taken for public uses. *Sacramento Valley R. R. Co.* v. *Moffatt*, 7 Cal. 579.

32. The plaintiff having entered into possession under S. M. H. and in subordination to his title, cannot question S. M. H.'s right to execute the mortgage or agreement which conferred the right of reëntry upon defendant. *Henderson* v. *Grewell*, 8 Cal. 584.

33. The possession of J. being that of his employer, was not notice to the purchaser of a mining claim. *Jenkins* v. *Redding*, 8 Cal. 603.

34. A mere trespasser upon the prior actual possession of a party cannot justify his act by showing the true title outstanding in a third person, no party to the suit; else a prior possessor might never gain any repose by virtue of his adverse possession, and could never gain a title under the statute of limitations. *Bird* v. *Lisbros*, 9 Cal. 5.

35. But when the plaintiff in ejectment does not rely on prior possession, but on his strict title, the defendant in possession having a good prima facie right may set up and show the true title to be in another party. *Ib.* 6.

36. Possession is evidence of title; and the party in possession is therefore deemed in law to be the owner. *Ib.* 7.

37. If any one acquires a title by adverse possession, it must be the party having the prior actual possession. The party having the prior actual possession is always entitled to recover the possession of the premises from the second possessor

when both claim only by possession, and the suit is only between two parties. *Humphreys* v. *McCall*, 9 Cal. 64.

38. It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner* v. *Marshall*, 9 Cal. 270.

39. The possession of one tenant in common is possession for all; but this possession is one which ceases the moment it becomes adverse to the others. *Partridge* v. *McKinney*, 10 Cal. 184.

40. It has been held that the declarations of a tenant in possession of land, those declarations being made at the time of possession, may sometimes be given in evidence as a part of the res gestæ, to qualify the possession, the possession being the transaction which the declarations illustrate. But in order, and prior to the introduction of these declarations, it must be proved that the tenant was in possession at the time the proposed declarations were made. *Ellis* v. *Janes*, 10 Cal. 458.

41. Where a party takes possession of a part of a tract of land under a deed of conveyance to the whole, and at the time of entry no one is holding adversely, such possession will extend to the whole tract described in the deed. *Rose* v. *Davis*, 11 Cal. 141.

42. Possession of the grantor under whom the plaintiff claims inures to the benefit of such plaintiff. *Ib.*

43. Possession of one partner or tenant in common is the possession of all. *Waring* v. *Crow*, 11 Cal. 371.

44. Parties taking possession of a quartz lead under an agreement made with another party cannot retain possession and refuse compliance with their agreement made in consideration of such possession and right to the lead. *Hitchins* v. *Nougues*, 11 Cal. 36.

45. The delivery of a deed and cutting of firewood on the tract is not sufficient evidence of possession. The cutting of timber by itself was neither possession or title as against the owner. *Stockton* v. *Garfrias*, 12 Cal. 316.

46. Open and notorious possession of real estate by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee's title. But the possession must exist at the time of the acquisition of title or deed of the subsequent vendee from the common vendor. *Hunter* v. *Watson*, 12 Cal. 376.

47. Where the complaint called upon the defendant to answer not only the character of the possession but the fact of possession of it, a failure to deny the averment is an admission of it. *Burke* v. *Table Mountain W. Co.*, 12 Cal. 407.

48. In an action of ejectment, where the complaint alleges possession in the defendant, a denial in the answer in the following words is not sufficient to put at issue the question of possession: "Defendant denies that he has unlawfully, wrongfully, and in violation of the plaintiff's rights, had the possession," etc. This denial might be true, and yet the defendants be in possession. The defendant was called on to answer not only the character of the possession, but the fact of possession. *Ib.* 409.

49. Though an agreement may show an attempt by plaintiff to get possession and work a mining claim in dispute on the day the defendant got his title, and though not sufficient of itself to show actual possession or a right of possession, yet shows a fact which in connection with other proof tended to prove the bona fides of plaintiff's claim, or notice of it by defendant. *McGarrity* v. *Byington*, 12 Cal. 430.

50. In an action of ejectment to recover mining claims, an answer to the complaint which avers "that any right which plaintiffs may have ever had to the possession, etc., they forfeited by a noncompliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute prior to the defendant's entry," is insufficient in not setting forth the rules, customs, etc. *Dutch Flat Water Co.* v. *Mooney*, 12 Cal. 534.

51. Where a party takes possession of a tract of land, and encloses it with a fence consisting of posts seven feet apart, and one board six inches wide nailed on to the posts, and the same is not sufficient to turn cattle, and the land is not cultivated, such possession is not sufficient to sustain an action of ejectment as against a party in possession of a part of the tract, under a deed to the whole. *Baldwin* v. *Simpson*, 12 Cal. 560.

52. The fact that a party had cattle on the land, or was there for short periods himself, or that he claimed within given

limits, is, in the absence of any enclosure or some visible physical signs of the extent of his boundaries or claim, insufficient to show the fact of possession of any particular tract, when others were also in possession. *Wilson* v. *Corbier*, 13 Cal. 167.

53. A perfect equity united with possession is, under our system, equivalent for all purposes of defense to a legal title. *Morrison* v. *Wilson*, 13 Cal. 500.

54. Possession of a tenant is not notice of his landlord's title. *Smith* v. *Dall*, 13 Cal. 511.

55. Possession of land at the death of a party gives prima facie title to his heirs or representatives. *Gregory* v. *McPherson*, 13 Cal. 572.

56. Mere prior possession of land cannot prevail against the present possession of defendant, taken under claim of title, derived regularly or not, from the rightful owner. *Gregory* v. *Haynes*, 13 Cal. 595.

57. Defendant had been let into possession under judgment in ejectment by him against C. This judgment is afterwards reversed. C. sells to G.: held, that defendant's possession was sufficient, until restored by due course of law, to break the force of the claim of G. based upon the prior possession of C. *Ib.*

58. The right to a preëmption in public land is not assignable; but the possession of public land, whether taken for the purpose of getting a preëmption right or any other purpose, or the land itself, may be mortgaged. *Whitney* v. *Buckman*, 13 Cal. 539.

59. An allegation in the complaint, that plaintiffs are the sons of Joaquin Castro, and have been in possession of the rancho since his decease, is, in the absence of a special demurrer, a sufficient allegation of heirship. *Castro* v. *Armesti*, 14 Cal. 39.

60. Where a complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but affirmatively shows it, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties, as an independent fact not in issue by the pleadings but affecting the whole case. *Powell* v. *Oullahan*, 14 Cal. 116.

61. The possession of agricultural land is prima facie proof of title against a trespasser; but where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burdge* v. *Smith*, 14 Cal. 383.

62. Mere entry on public land, without enclosing it, does not give a right of action on the possession alone. *Wright* v. *Whitesides*, 15 Cal. 47.

63. A party claiming land under the possessory act of 1852, must show compliance with the provisions of the act. He must be a citizen of the United States; must file the affidavit required by section two; and make his improvements within ninety days, etc. Merely residing on a part of the land, tracing lines, putting up stakes for boundaries, etc., is not sufficient. *Ib.*

64. Merely going on waste, uninclosed public land, and building or occupying a house and corral, and even subsequently cutting hay on part of the land, does not give the party any claim to or possession of the whole tract of one hundred and sixty acres. The case would be different if the party claimed and entered under the possessory act of this State, and pursued the necessary steps prescribed by it; or probably, if he had made his entry under the preëmption laws of the United States. *Garrison* v. *Sampson*, 15 Cal. 95.

65. Where, in such case—there being no claim under the possessory act, or the preëmption laws of the United States—plaintiff claims one hundred and sixty acres by force of his prior possession, and a contract or consent on the part of defendant, whom he let into possession, to hold the premises for him, or subject to his order, the judgment cannot be in favor of plaintiff for the whole tract, but only for the small part on which the house and corral were situated, and of which plaintiff was in the actual occupancy—there being no proof, except defendant's general consent, as above named, that defendant agreed to hold the whole tract for plaintiff. *Ib.*

66. In ejectment for mineral land, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied the land

for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, were insufficiently denied in the answer; but the answer averred affirmatively, that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States, contained large and valuable deposits of gold, that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The court below gave judgment for plaintiff on the pleadings: held, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings because the character of his possession did not appear, the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever. *Smith* v. *Doe*, 15 Cal. 104.

67. The allegation of possession is too broad to defeat the rights of a person who has in good faith located upon public mineral land for the purpose of mining. *Ib.*

68. Ejectment for mining ground, the parties being owners of claims on opposite sides of the same hill. Plaintiffs were an ordinary joint stock company, or common partnership, and claimed by purchase and transfer from the original members of the company. The practice of the company was to issue to members certificates of stock, and these certificates constituted the only evidence of membership recognized by the company, transfers being made by an assignment of the certificates, and a notice thereof in the books of the company. On the trial, these certificates with the assignments were read in evidence by plaintiffs, to show their interest in the ground, and their right to maintain the action, defendants objecting to them on the ground of irrelevancy, and that their execution was not proved. The court instructed the jury—1st, that if they found that plaintiffs located their claim as now claimed, before the location of defendants' claim, then they should find for plaintiffs; and 2d, if they found that defendants never located any claim adjoining plaintiff's claim, then they should find for plaintiffs: held, that the instructions are wrong, as violating the principle that plaintiff must recover on the strength of his own title; that defendants, having been in actual possession for a long time, were not required to show anything beyond it until a prior and paramount right was shown in plaintiffs; that it was not essential to defendants' possession that they had ever formally *located* their claim in accordance with any mining regulations, or that they had or claimed any other mining ground. *Pennsylvania Mining Co.* v. *Owens*, 15 Cal. 136.

69. Possession taken of the property mortgaged, by consent of the owner or by contract with him, may confer rights as against third parties, but they are independent and distinct from any rights springing from the mortgage, from which they derive no support. *Johnson* v. *Sherman*, 15 Cal. 293.

70. To sustain forcible entry and detainer, plaintiff must have been in actual possession, and where the land is public land, not taken up under our possessory act nor under the federal laws, such actual possession can be shown only by actual inclosure or its equivalent. *Preston* v. *Kehoe*, 15 Cal. 318.

71. A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchaser and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person who does not complain. *Treadwell* v. *Payne*, 15 Cal. 499.

72. Where a vendee of personal property buys it bona fide, takes possession openly and holds it in exclusive possession for a year or more, and afterwards puts the property into the possession of the vendor as attorney in fact of the vendee, this qualified possession of the vendor does not, as matter of law, show the sale to be fraudulent and void as against the creditors of the vendor. *Stevens* v. *Irwin*, 15 Cal. 506.

73. Where plaintiff had been in the peaceable and quiet possession and use of premises through his agent and by his tenants, and the building being unrented, had locked the door and taken the key to his office, he was in the "actual possession"

of the premises, within the statute of forcible entry and detainer. *Minturn* v. *Burr*, 16 Cal. 109.

74. That statute does not require actual occupancy, and "actual possession" consists as much of a present power and right of dominion as of an actual corporal presence in the house. *Ib.*

75. Where a building locked up and so in possession of plaintiff has been entered by third persons, and taken possession of forcibly and unlawfully, and is detained, it should be left to the jury to determine how and by whose direction, agency, or procurement the entry was made, and whether by preconcert and arrangement or not; and if they find possession was not taken by the act, agency, and coöperation of all the defendants, and the holding, whether by one or many, was in pursuance of such arrangement or preconcert, then the defendants are guilty of the entry and detainer. *Ib.*

76. The fact that the defendants did not themselves go into the actual corporal possession of the premises, or did not personally take possession or make entry, does not defeat the action. *Ib.*

77. The objection to a complaint in forcible entry and detainer, that it does not aver "actual" possession—the word "possession" only being used—was a mere defect in pleading, which should have been taken advantage of below, where, if the objection be good, the complaint could have been amended, but it cannot be urged in the supreme court for the first time. *Ib.*

78. There is no necessity, in a complaint in ejectment, in negativing the possibly rightful character of defendant's possession. Such possession is a pleadable and issuable fact; but if it rest upon any existing right, defendant must show it affirmatively in his defense. *Payne* v. *Treadwell*, 16 Cal. 243.

79. On the trial in ejectment, plaintiff can rest his case, in the first instance, upon proof of his seizing, and of the possession by defendants. From these facts, when established, the law implies a right to the present possession in the plaintiff, and a holding adverse to that right in defendants. *Ib.* 244.

80. In this State, although the larger portion of the mineral lands belong to the United States, yet defendant cannot defeat an action for mining claims, water privileges and the like, by showing the paramount title of the government. Our courts, in determining controversies between parties thus situated, presume a grant from government to the first appropriator. This presumption, though of no avail against the government, is held absolute in such controversies. *Coryell* v. *Cain*, 16 Cal. 572.

81. In controversies respecting public lands, other than mineral lands, the title, as between citizens of the State, where neither party connects himself with the government, is considered vested in the first possessor, and to proceed from him. This possession must be an actual one, and not constructive; and the right it confers must be distinguished from the right given by the possessory act of the State. *Ib.*

82. A party relying on the possessory act of the State must show compliance with its provisions, and can then maintain an action for the possession of land occupied for cultivation or grazing, without showing an actual enclosure or actual possession of the whole claim. *Ib.* 573.

83. Where plaintiff relies not on the possessory act of the State, but on the prior possession of himself, or of parties through whom he claims, such possession must be shown to have been actual in him or them; and by actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. *Ib.*

84. The cases where possession must be surrendered, before action for the purchase money can be brought, are those where a contract has been made, and possession has been taken thereunder, and the vendee seeks to rescind the contract, on the ground of defective title, or the inability of the vendor to perform the contract on his part, or of some fraudulent representations inducing its execution. In these cases, the vendee must first offer to restore whatever he has received, before he can call upon the vendor to refund the purchase money. Where the contract is void, there is nothing to rescind; no rights are acquired, and there are in consequence no rights to restore. This distinction between the cases where the possession is taken under a con-

tract, and where there is possession with a void contract—that is, where there is no contract—rests upon principle, and is fully recognized by the authorities. *Mc Cracken* v. *City of San Francisco*, 16 Cal. 628.

85. To render possession adverse, so as to set the statute of limitations in motion, it must be accompanied with a claim of title; and this claim, when founded "upon a written instrument as being a conveyance of the premises," must be asserted by the occupant in good faith, in the belief that he has good right to the premises, and with the intention to hold them against all the world. The claim must be absolute—not dependent upon any contingencies—and must be "exclusive of any other right;" and to render the adverse possession, thus commenced, effectual as a bar to a recovery to the true owner, the possession must be continued without interruption, under such claim, for five years. When parties assert, either by declarations or conduct, the title to property to be in others, the statute cannot, of course, run in their favor. Their possession, under such circumstances is not adverse. It would seem impossible, therefore, for the parties who have sued for the purchase money—basing their right to recover upon the ground that the title to the property never passed to them, but that it still remains in the city, and that the proceedings of the mayor and land committee were unauthorized acts—to set up an adverse possession against the city. *Ib.* 636.

See EJECTMENT, IV, FORCIBLE ENTRY AND DETAINER, USE AND OCCUPATION.

II. OF PERSONAL PROPERTY.

86. The rule of law that possession of personal property is prima facie evidence of ownership is uniform, and applies as well to vessels. *Bailey* v. *Steamer New World*, 2 Cal. 373.

87. Possession of personal property is prima facie evidence of ownership. The possession of the servant is the possession of the master. *Goodwin* v. *Gaar*, 8 Cal. 617.

88. A party in the actual possession of cattle at the time of the injury, can maintain an action for an injury to them while in his possession. *Polk* v. *Coffin*, 9 Cal. 58.

89. The possession of a promissory note, whether obtained before or after maturity, is prima facie evidence of ownership. *McCann* v. *Lewis*, 9 Cal. 246.

90. Lawful possession of personal property is prima facie evidence of ownership, and property thus possessed is prima facie liable to be seized under a writ of attachment against the party in possession of such property. *Killey* v. *Scannell*, 12 Cal. 75.

91. The doctrine of continuous possession of personal property has no application to the case of a paper, the mere evidence of a debt. *Hall* v. *Redding*, 13 Cal. 220.

92. Personal property beyond the limits of this State, assigned in trust to pay the creditors of the assignor, the assignor and assignee both residing and being at the time in the foreign jurisdiction, where the property was, and possession being taken by the latter, rest in the assignee according to the lex loci, and his title will be maintained here against execution by the creditors of the assignor. *Forbes* v. *Scannell*, 13 Cal. 276.

93. A surviving partner has, under the statute of May, 1850, regulating the settlement of the estates of deceased persons, section one hundred and ninety-eight, the exclusive right to possession, and the absolute power of disposition of the assets of the partnership. *People* v. *Hill*, 16 Cal. 118.

See DELIVERY, SEGREGATION, STATUTE OF FRAUDS.

III. ABANDONMENT OF POSSESSION.

94. Laying off land into town lots, selling the same, and exercising other acts of ownership over them, is no evidence of abandonment; but taken in connection with previous acts of ownership, furnishes additional evidence of possession. *Plume* v. *Seward*, 4 Cal. 97.

95. Where a party only shows prior possession, that reliance may fail, if it be shown that he voluntarily abandoned his possession, without the purpose of returning. *Bequette* v. *Caulfield*, 4 Cal. 279.

96. The removal of an enclosure of land, for the purpose of replacing it with a better one, so far from being evidence of

an intention to abandon the premises, is direct evidence of the contrary. *Sweetland* v. *Hill*, 9 Cal. 557.

97. The doctrine of abandonment only applies where there has been a mere naked possession without title. But where there is a title, to preserve it there need be no continuance of possession; and the abandonment of possession cannot affect the rights held by virtue of the title. *Ferris* v. *Coover*, 10 Cal. 631.

98. In ejectment it is not reasonable to hold that plaintiffs intended to abandon all rights to any other land, provided the official survey did not conform to the boundaries they indicated. *Moore* v. *Wilkinson*, 13 Cal. 489; *Moore* v. *Roff*, 13 Cal. 489.

POWDER MAGAZINE.

1. The act of the legislature of 1852, authorizing the construction of a powder magazine in the city of San Francisco, did not repeal the right of the city to license a powder magazine which previously existed by virtue of the power granted in her charter, and powder could be stored in either magazine. *Harley* v. *Heyl*, 2 Cal. 481.

POWER.

1. The power to fill an office carries by implication the power to fill a vacancy and all necessary authority to carry out the original power, and prevent it from becoming inoperative. *People* v. *Fitch*, 1 Cal. 536; *People* v. *Campbell*, 2 Cal. 137.

2. Corporations or quasi corporations possess only such powers as are expressly given by statute or by their charter, and such as are necessary to the exercise of the powers enumerated. *Dunbar* v. *City of San Francisco*, 1 Cal. 356.

3. The State has the power to require the payment by foreigners of a license fee for the privilege of working the gold mines in this State. *People* v. *Naglee*, 1 Cal. 235.

4. The authority by act of the legislature to erect a court house and jail, would necessarily embrace the power to purchase the land on which to erect them. *De Witt* v. *City of San Francisco*, 2 Cal. 295.

5. Where a vendor under a power to sell in a mortgage, received instead of money an article of fluctuating value, he is chargeable with the highest market value of the lot sold. *Benham* v. *Rowe*, 2 Cal. 408.

6. Authority to deliver goods confers no authority to take them back, or to countermand the shipment. *Adams* v. *Blankenstein*, 2 Cal. 418.

7. Prima facie the governor of California, under the Mexican dominion, had the power to make a grant of mission lands to an individual, and a demurrer to a complaint setting forth such a grant, on the ground of want of authority in the governor, is not sustainable. *Den* v. *Den*, 6 Cal. 82; *Brown* v. *City of San Francisco*, 16 Cal. 458.

8. When an agent is required to accomplish a certain end, or to do a certain thing, all necessary incidental powers are implied. *Lucas* v. *City of San Francisco*, 7 Cal. 473.

9. An agent cannot delegate discretionary powers, but he may delegate mere mechanical powers or duties. *Sayre* v. *Nichols*, 7 Cal. 542.

10. An agent for the collection of a note is confined to the taking of money in payment, and has no power to take goods in payment, unless special authority be given, of which there must be proof. *Mudgett* v. *Day*, 12 Cal. 140.

11. The authority of an attorney, who appears will be presumed, and his action bind the party, unless in cases of fraud or insolvency of the attorney. *Holmes* v. *Rogers*, 13 Cal. 201.

12. Authority to an agent in general terms to collect or secure a claim of the principal, is not an authority to purchase for the principal the property of the debtor to secure the claim. Such purchase is not the natural or usual means of securing the debt. *Taylor* v. *Robinson*, 14 Cal. 899.

13. If an agent has a power coupled with an interest, that is, a power which conveys to the agent an interest in the property, then the execution of the power

after the death of the principal is good. *Travers* v. *Crane*, 15 Cal. 16.

14. In this State there is no limitation upon the power of disposition by will. *Norris* v. *Harris*, 15 Cal. 254.

See AGENCY, POWER OF ATTORNEY.

POWER OF ATTORNEY.

1. An agent, authorized by power of attorney, to wind up and adjust the affairs of a mercantile house in the city of New York, derives no authority therefrom to bind his principal by a promissory note given for the purchase of real estate in the city of San Francisco. *Fisher* v. *Salmon*, 1 Cal. 414.

2. A power of attorney acknowledged before a notary public in New York city, who is not authorized by our statute to take such acknowledgments, is insufficient. *Lord* v. *Sherman*, 2 Cal 501.

3. When the vendor, under a power of sale reserved in such a contract, sells the property either at public or private sale, the surplus beyond the purchase money due belongs to the vendee, and the payment of it may be decreed by judgment of the court against the vendor. *Gouldin* v. *Buckelew*, 4 Cal. 111.

4. A power of attorney confirming all sales, leases and contracts, of every description, confers the power to sell land. *Sullivan* v. *Davis*, 4 Cal. 292.

5. General words in a power of attorney are limited and controlled by particular terms and designations. The authority granted by B to A to do all acts in his name, concerning their mining operations, followed by the authority to sign B's name to any "company articles," does not authorize A to sign B's name to a promissory note, even where the money was used to carry on joint mining operations. *Washburn* v. *Alden*, 5 Cal. 464.

6. The destruction of a power of attorney does not destroy the power. Upon the loss, its existence might have been shown, and the power continued so as to carry out the object of both the principal and agent. *Posten* v. *Rassette*, 5 Cal. 469.

7. Where a power of attorney is coupled with an interest, upon proper allegations, sustained by unequivocal proof, a court of equity will restrain its revocation and enable the attorney to execute the trust. *Ib.*

8. A party who gives a general power of attorney to another to transact all business, authorizing the attorney "to make, execute and deliver promissory notes," will be held liable for all such notes, etc., executed in his name by his attorney, when they have reached the hands of an innocent holder, although they may have been made for the private purposes of the attorney. *Hellman* v. *Potter*, 6 Cal. 15.

9. A power of attorney authorizing the attorney "to settle and adjust all partnership debts, accounts and demands, and all other accounts and demands, now subsisting, or which may hereafter subsist between me and any person or persons whatever," and to execute releases for such purposes, does not confer a power to release a covenant of guaranty made to the principal and others jointly for the payment of rent and purchase money of property sold by them as tenants in common. *Johnston* v. *Wright*, 6 Cal. 375.

10. Where authority to perform specific acts is given by a power of attorney, and general words are also employed, such words are limited to the particular acts authorized. *Billings* v. *Morrow*, 7 Cal. 175.

11. A general ratification of all the acts of an attorney does not include acts not within the scope of the power. The principal who ratifies must know the character of the acts to be ratified, otherwise the ratification is void. *Ib.*

12. The principal is not bound to notice recorded conveyances, executed in his name by his attorney, not authorized by the power. *Ib.*

13. It must be assumed that as a party made the power of attorney to be executed in this State, he did so with a full knowledge of the law as it existed here at the time. *Davidson* v. *Dallas*, 8 Cal. 249.

14. Where a principal gives a power expressly to collect debts for the purpose of providing the means to return advances made by the agent, there would seem to be no doubt of the irrevocable character of the power. *Marziou* v. *Pioche*, 8 Cal. 535.

15. Where D. gave a power of attorney to P., authorizing and empowering him to

"sell and convey" certain real property, belonging to D. & P., executed to V. a deed of the property, purporting on its face to be for the consideration of $8,000, when, in fact it was not executed upon any sale or for any consideration paid or agreed to be paid, but in order to enable V. to control the property, and keep off trespassers, held, that the deed not being executed in pursuance of the power, did not pass any title to the grantee, and, as between the attorney and the grantee, it was a nullity. *Dupont* v. *Wertheman*, 10 Cal. 367.

16. A power to sell and convey property is special, and must be strictly pursued. *Ib.*

17. No presumption of a ratification of an alleged sale under a power can be indulged, unless knowledge of the alleged sale, with its attendant circumstances, is brought home to the grantee of the power. *Ib.*

18. A power of attorney not affecting real estate is not required to be recorded, and the fact of such instrument being acknowledged and recorded does not authorize it to be read in evidence without proof of its execution. *Stevens* v. *Irwin*, 12 Cal. 308.

19. A deed made under and in pursuance of a general power of attorney, which authorizes the attorney "to make and execute conveyances," and where the purchase money was received by the principal, cannot be assailed for the want of authority to execute it. *Hunter* v. *Watson*, 12 Cal. 376.

20. Where a building is in process of construction by three tenants in common, according to a plan agreed on, a power of attorney from one to an agent, authorizing him "to represent the principal's interest in the property, to cast his vote in relation thereto, in all matters relating to the administration or improvement of the property, and to do and perform every act or thing relating to and concerning such interest, except the sale or hypothecation thereof," authorizes the agent to consent to alterations in the plan. *Hastings* v. *Halleck*. 13 Cal. 211.

21. Where a power of attorney, not under seal, authorizes the agent to sell a saw mill, dwelling, etc., by the execution of all needful instruments, sealed or otherwise, and the agent sells the right of the principal by a paper not under seal, representing himself as the attorney of the principal, and the vendee takes possession and retains it for several years, he has an equitable estate in the premises, with the right to its full enjoyment, and this right, united to possession, enables him to maintain an action for interruption to his possession, or injury to the property. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 13 Cal. 234.

22. A power of attorney to sell land must contain some description of the property sold, unless it be shown aliunde that the land in controversy is the only land owned by the principal at the time. *Stafford* v. *Lick*, 13 Cal. 242.

23. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful detainer against such third persons, whether the agent had any written authority or not. And where proof was admitted, without objection, of the acts of the agent in renting and controlling the property for the principal, defendant cannot afterwards claim a nonsuit on the general ground that no power of attorney from the principal was shown, and that, therefore, his possession was not sufficiently proven. *Minturn* v. *Burr*, 16 Cal. 109.

24. A power of attorney, authorizing the agent to "superintend my real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way, real or personal, whatsoever, giving my said attorney full power to use my name, to release others or bind myself, as he may deem proper and expedient, hereby making the said Schoolcraft my general attorney and agent, and by these presents ratifying whatsoever my said attorney may do by virtue of this power," gives the agent power to execute a lease of real estate, containing a clause that the lessee "shall have the privilege of purchasing any part of said land during the continuation of this lease, at its value, in preference to any other persons." *De Rutte* v. *Muldrow*, 16 Cal. 512.

25. Where a power of attorney rela-

tive to real estate authorizes the agent "to grant, bargain and sell the same, or any part or proportion thereof, for such sum or price, and on such terms as to him might seem meet," the agent has no power to make a conveyance in consideration of love and affection in the principal for the grantee in the conveyance, and such conveyance is on its face a nullity. The power of attorney authorizes a sale for a monied consideration only. *Mott* v. *Smith*, 16 Cal. 557.

PRACTICE.

1. After the process of the court is finally and completely executed, from that moment the power of the sheriff under it, and the authority of the court to enforce it, cease. *Loring* v. *Illsley*, 1 Cal. 28.

2. When a cause is assigned for trial on a certain day, and afterwards for a novel reason the court abridges the delay, without the consent of the defendant, and orders the cause to be tried at an earlier day, the proceedings are irregular. *Horrell* v. *Gray*, 1 Cal. 134.

3. In an action on a promissory note by a special endorsee against the maker, the plaintiff must prove at the trial the genuineness of the endorsements, although the defendant has not denied the same under oath. It need not be proven in the action against the endorsers, if they fail to deny the genuineness of the endorsements. *Grogan* v. *Ruckle*, 1 Cal. 159; *Youngs* v. *Bell*, 4 Cal. 202.

4. All distinctions between actions at law and suits in equity, and between the forms of such actions, are abolished. *Rowe* v. *Chandler*, 1 Cal. 173.

5. The legislature clearly intended by the code that all technical and formal defects should be disregarded, and the rights of all parties to a suit should be determined in that suit, without turning the parties round to a new action for the purpose of obviating some technical difficulty. *Ib.*

6. The code provides that there shall be but one form of civil action, but it does not intend to abolish all distinctions between law and equity as to actions. The innovation extends only to the form of action and the pleadings, while the technicalities of the pleading have been dispensed with. *Dewitt* v. *Hays*, 2 Cal. 468; *Smith* v. *Rowe*, 4 Cal. 7.

7. The plaintiff, and not the defendant, always in contemplation of law, has the affirmative, and the right to open and conclude the argument. *Benham* v. *Rowe*, 2 Cal. 408.

8. The code gives to a married woman the right to sue in her own name without her husband, when it concerns her separate estate. *Snyder* v. *Webb*, 3 Cal. 86.

9. A married woman cannot bring suit in her own name upon a contract which she is not authorized by statute to make. *Ib.* 88.

10. Under the code, where the mere forms of proceeding are simplified, all that is substantial in the body of the law is preserved to give it certainty and logical conclusiveness as a science. *Sampson* v. *Shaeffer*, 3 Cal. 201.

11. In the absence of any statutory prohibition, the court may in equity resort to the well known rules and settled principles of chancery cases. *Smith* v. *Rowe*, 4 Cal. 7.

12. No statute should be construed so as to give a retrospective effect to divest the rights of individuals vested previous to its passage, or previous to the time the act took effect, unless such intention be expressed in terms. *People* v. *Hays*, 4 Cal. 131.

13. It is always within the power of a court when exercising proper discretion to extend the time fixed by law, whenever the ends of justice would seem to demand such an extension. *Wood* v. *Forbes*, 5 Cal. 62.

14. Two of the leading ends contemplated by the code are simplicity and economy. *Adams* v. *Hackett*, 7 Cal. 201; *Piercy* v. *Sabin*, 10 Cal. 28.

15. Our system of practice recognizes none of the old forms of action, but is designed to afford a plain, unembarrassed remedy upon the particular facts of each case. *Ortman* v. *Dixon*, 13 Cal. 37.

16. The code, regulating proceedings in civil cases, applies as a general rule, as well to equity as to common law suits. *Riddle* v. *Baker*, 13 Cal. 302; *Goodwin* v. *Hammond*, 13 Cal. 169; *Duff* v. *Fisher*, 15 Cal. 380.

17. Mining claims are real estate with-

in the code, defining the venue of civil actions. *Watts* v. *White*, 13 Cal. 324.

18. Where it appears from the whole conduct of a cause that a particular fact is admitted between the parties, the jury have the right to draw the same conclusion as to that fact as if it had been proved in the evidence, and to draw such conclusions as to all the issues on the record. *Powell* v. *Oullahan*, 14 Cal. 117.

19. The legislature may constitutionally prescribe rules of practice in criminal or civil cases. *People* v. *Arnold*, 15 Cal. 479.

See ADMISSION, AMENDMENT, ANSWER, APPEAL, COMPLAINT, DEMURRER, PLEADING.

PRE-EMPTION.

1. Where the defendant claimed title to the premises as part of a preëmption claim located by him, he must prove an inclosure of, or marked and visible boundaries, embracing the lot in dispute. *Larue* v. *Gaskins*, 5 Cal. 166.

2. The policy of the government of the United States has been to encourage the immigration of foreigners, and to this extent a system of preëmption has been adopted in all territories and new States, in which there is no discrimination between foreigners and native citizens. *People* v. *Folsom*, 5 Cal. 379.

3. The right to a preëmption in public land is not assignable; but the possession of public land, whether taken for the purpose of getting a preëmption right or any other purpose, or the land itself, may be mortgaged. *Whitney* v. *Buckman*, 13 Cal. 539.

4. A defendant in ejectment, claiming under the government of the United States as a new preëmptioner, cannot show that the land described in the grant from the Mexican government and petition to the land commissioners is different from that embraced in the patent. *Yount* v. *Howell*, 14 Cal. 469.

5. Settlers upon mining lands cannot claim title under the preëmption law, as mineral lands are expressly exempted from preëmption by the legislation of Congress. *Boggs* v. *Merced Mining Co.*, 14 Cal. 373.

6. The municipal preëmption act of May 23d, 1844, confers a right upon the corporate authorities or county judges, to purchase the land forming a town site, at the minimum government price, for the benefit of the inhabitants thereof, before the commencement of the public sale of the body of the land in which the town site is included—and if such right be not exercised, such lands, with the general mass, are offered for sale to the public. *Doll* v. *Meador*, 16 Cal. 314.

See LAND.

PRESCRIPTION.

See LIMITATION, STATUTE OF.

PRESUMPTION.

1. A grant of land by a Mexican alcalde before the war will be presumed to have been made in the course of his ordinary and accustomed duties and within the scope of his legitimate authority, and the burden of proof lies on him who controverts the validity of such a grant to show that it is not made by a competent officer and in the form prescribed by law. *Reynolds* v. *West*, 1 Cal. 326; *Payne* v. *Treadwell*, 16 Cal. 227.

2. Where judgment was entered upon a default for $124.75, and it did not appear that any testimony had been heard, the presumption that a judicial officer had acted regularly was held to apply. *Crane* v. *Brannan*, 3 Cal. 195.

3. In the absence of proof, where the judgment itself of another State is silent on the subject, it will be presumed that under the law of that State no interest is allowed on judgments of that character. *Thompson* v. *Manrow*, 2 Cal. 100; *Cavender* v. *Guild*, 3 Cal. 253.

4. A grant of land in San Francisco

made by an alcalde, whether a Mexican or of any other nation, raises the presumption that the alcalde was a properly qualified officer; that he had authority to make the grant, and that the land was within the boundaries of the pueblo. *Cohas* v. *Raisin*, 3 Cal. 450.

5. Where there is no abandonment or dedication of the land, the use for a limited time by the public cannot fairly raise the presumption of a dedication. *City of San Francisco* v. *Scott*, 4 Cal. 116.

6. Where proof has been given that a newspaper containing notice of the dissolution of a partnership between the defendants was taken by the plaintiffs at the time, it is not error to admit in evidence other papers not taken by way of establishing the publicity of the notice, and raising the presumption of their actual knowledge of the fact. *Treadwell* v. *Wells*, 4 Cal. 263.

7. Where two parties rely upon possession solely, as proof of title, the presumption of ownership is in favor of the first possessor. *Potter* v. *Knowles*, 5 Cal. 88.

8. Where a hired person continues in employment after the expiration of the contract, and without any new contract, the fair presumption is that both parties understood that the same salary was to be paid. *Nicholson* v. *Patchin*, 5 Cal. 475.

9. An officer will not be presumed to have exceeded his authority, especially the officer of a foreign government. *Den* v. *Den*, 6 Cal. 82.

10. The question of homestead is a question of fact, and the presumption arising from residence may be defeated by facts and circumstances aliunde. *Holden* v. *Pinney*, 6 Cal. 236.

11. For the purpose of settling men's differences, a presumption is often indulged, where the fact presumed cannot have existed. *Conger* v. *Weaver*, 6 Cal. 556.

12. Possession gives title only by presumption: then, when the possession is shown to be public land, why may not any one oust the possessor? Why can the latter protect his possession? Only upon the doctrine of presumption for a license to occupy from the owner will be presumed. *Ib.* 557.

13. Where plaintiffs gave their note, payable in one year, with ten per cent. interest, when the current rate was ten per cent. per month, in consideration of which he received a covenant from the payees to convey them certain land, on the payment of the note at maturity, the low rate of interest raises the presumption that the parties intended that the note should be paid at maturity. *Brown* v. *Covillaud*, 6 Cal. 572.

14. When there are two presumptions equally reasonable, arising upon the face of the record, this court is bound to adopt that which will maintain the judgment of the court below. *Whipley* v. *Flower*, 6 Cal. 632.

15. The fact that a bill of exchange by the usual conveyance reached its destination within a month from its date, was sufficient to raise a presumption that defendants had received notice of payment in double that time. *Weaver* v. *Page*, 6 Cal. 684.

16. A party being about to fail can assign a bill of lading of the goods to arrive, not yet paid for, to another in trust for the vendor, and the vendor's assent is presumed, being for his benefit. *Le Cacheux* v. *Cutter*, 6 Cal. 681.

17. Parties in possession of land claiming title thereto are presumed to be the owners of the same. *Sacramento Valley R. R. Co.* v. *Moffat*, 7 Cal. 579.

18. In the case of an absent person, from whom no tidings are received, the presumption of life ceases at the end of seven years. *Ashbury* v. *Sanders*, 8 Cal. 64.

19. The fact that a fugitive from justice had not been heard of for sixteen months, and that he was a passenger on a particular vessel, bound for a specified port, and that neither the vessel nor crew had ever been heard from, is not sufficient to raise a legal presumption of death. *Ib.*

20. The act of the officer making the assessment must be presumed to be in conformity with law, until the contrary is shown. *Palmer* v. *Boling*, 8 Cal. 387.

21. Where a party employed receives a regular specific monthly salary for his services, the presumption of law is that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary, and to overcome this presumption he must show an express agreement for extra pay, otherwise he cannot recover. *Caney* v. *Halleck*, 9 Cal. 201.

22. Where there is an entire absence of evidence in the record on a point, still the presumption would be in favor of the jurisdiction of the court, and of the regularity of its proceedings; and for the want of such evidence the decree cannot be impeached in this collateral action. *Alderson* v. *Bell*, 9 Cal. 321; *Battersby* v. *Abbott*, 9 Cal. 568; *People* v. *Glenn*, 10 Cal. 37.

23. Mere hearsay evidence of the wife having given birth to a child more than a year after the separation, and connecting therewith the name of a third party as its reputed father, raises no presumption of access by the husband. *Wells* v. *Stout*, 9 Cal. 498.

24. The law presumes in favor of the acts of all public officers. *Summers* v. *Dickenson*, 9 Cal. 556; *Hart* v. *Burnett*, 15 Cal. 616.

25. If a child is over fourteen years of age, the presumption is that he possesses the requisite knowledge and understanding to be a witness; but if under that age the presumption is otherwise, and it must be removed upon the examination by the court, or under its direction and in its presence, before he can be sworn. *People* v. *Bernal*, 10 Cal. 67.

26. No presumption of a ratification of an alleged sale under a power can be indulged, unless knowledge of the alleged sale, with its attendant circumstances, is brought home to the grantee of the power. *Dupont* v. *Wertheman*, 10 Cal. 367.

27. Presumptions are the conclusions which the law draws from acts which leave no reasonable question of the intent or motive. *Williams* v. *Covillaud*, 10 Cal. 428.

28. The mere fact that one tenant in common or partner goes away and remains absent from the premises of the joint business or property, leaving his associates in possession, creates no presumption of abandonment, nor does his refusal to pay, or his delay in paying the expenses of the business, or the assessments, create of itself a forfeiture. *Waring* v. *Crow*, 11 Cal. 371.

29. The law of this State in relation to the right of husband and wife as to the common property is similar to the laws of Louisiana and Texas; and in those States it is held by their highest tribunals, that all property acquired by either spouse during the existence of the community is presumed to belong to it, and that this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one or the other; and that the burden of proof lies upon the party claiming the property as separate. *Smith* v. *Smith*, 12 Cal. 224; *Meyer* v. *Kinzer*, 12 Cal. 252.

30. Where a brick building was erected on such lots during the existence of the community, the presumption that it was but the form in which the common property was invested is too cogent to be overcome by loose and unsatisfactory testimony. *Smith* v. *Smith*, 12 Cal. 224.

31. The invariable presumption which attends the possession of property by either spouse, during the existence of the community, can only be overcome by clear and certain proof that it was owned by the claimant before marriage, and acquired afterwards in one of the particular ways specified in the statute, or that it is property taken in exchange for or in the investment, or as the price of the property so originally owned or acquired. *Meyer* v. *Kinzer*, 12 Cal. 253.

32. The law presumes nothing in favor of the jurisdiction of justices' courts, and a party who asserts a right under the judgment of a justice, must affirmatively show every fact necessary to confer such jurisdiction. *Swain* v. *Marsh*, 12 Cal. 285.

33. A child born in lawful wedlock is presumed to be the child of the husband. *Baker* v. *Baker*, 13 Cal. 99.

34. Presumptions are indulged to supply the absence of facts, but never against ascertained established facts. *Boggs* v. *Merced Mining Co.*, 14 Cal. 375.

35. It is a very convenient rule in determining controversies between parties on the public lands, where neither can have absolute rights, to presume a grant from the government of mines, water privileges and the like to the first appropriator, but such a presumption can have no place for consideration against the superior proprietor. *Ib.*

36. The presumption under our statute is, that all land in the State is public land until the legal title is shown to have passed from the government to private parties, and this presumption is reconcilable with the presumption arising from possession. *Burdge* v. *Smith*, 14 Cal. 383.

37. The possession of agricultural land

is prima facie proof of title against a trespasser, but where it is shown that the party goes on mineral lands to mine, there is no presumption that he is a trespasser, and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burdge* v. *Smith*, 14 Cal. 383; *Coryell* v. *Cain*, 16 Cal. 573.

38. In the absence of proof to the contrary, the common law is presumed to exist in those States in the Union which were originally colonies of England, or were carved out of such colonies. *Norris* v. *Harris*, 15 Cal. 252.

39. No such presumption can prevail as to the States of Florida, Louisiana and Texas. In these States, at the time of their accession to the country, organized governments existed, the laws of which remained in force until they were abrogated by proper authority, and new laws were promulgated. *Ib.* 253.

40. In the absence of proof as to the laws of Texas, the courts of this State, in interpreting a will made in that State, will presume its laws to be in accordance with the laws of California. *Ib.*

41. Where an appeal is taken by a party, and as a condition to give it effect, a bond or undertaking, with or by sureties, is annexed—the undertaking being executed for the benefit of the appellant—the law presumes it was executed at his request, and probably no proof of that fact is requisite in a suit by the surety against the appellant, for money paid on account of the suretyship. At all events, very slight proof of such request would be required. *Bostic* v. *Love*, 16 Cal. 73.

PRIEST.

1. The position of a priest who appears to have charge of church property coupled with an interest seems to be nearly analogous to that of a sole corporation in England, and his power to sue is an inseparable incident to such corporation. *Santillan* v. *Moses*, 1 Cal. 94.

2. A priest had no authority to lease lands belonging to the mission after the cession of California to the United States, and a title so derived is invalid. *Brown* v. *O'Connor*, 1 Cal. 419.

See MISSIONS.

PRINCIPAL.

See AGENCY, POWER, POWER OF ATTORNEY.

PRINTER, STATE.

1. The legislature having elected a State printer, who resigned, and a State printer was during the session of the legislature appointed by the governor, and he resigned after the adjournment and during the recess, whereupon the governor appointed another person to fill the vacancy supposed to exist: held, that this second appointment, as well as the first one, was irregular and void. *People* v. *Fitch*, 1 Cal. 536.

2. The act of May 1st, 1854, creating the office of State printer, required the controller to draw his warrants on the treasury for such sums as may be due the State printer. This does not conflict with the general law requiring there should first be funds appropriated for that purpose. *Redding* v. *Bell*, 4 Cal. 333.

See OFFICE.

PRISONER.

See IMPRISONMENT.

PRIVILEGE.

1. The confidential counselor, solicitor, or attorney of a party, cannot be compelled to disclose the communications made to him, or letters or entries made to him in that capacity; and the same rule extends also to the clerk of an attorney. *Landsberger* v. *Gorham*, 5 Cal. 451.

PROBATE COURT.

1. *Letters of guardianship of a lunatic, issued by a probate court, cannot be questioned in a collateral proceeding.* *Warner* v. *Wilson*, 4 Cal. 313; overruled in *Smith* v. *Andrews*, 6 Cal. 654.

2. The constitutional provision which requires that in all issues of fact joined in the probate courts the jurisdiction of the district courts shall be unlimited, does not give the district court an appellate jurisdiction from the probate courts. *Reed* v. *Mc Cormick*, 4 Cal. 342.

3. The claim of exclusive original jurisdiction in courts of probate over the persons of minors as well as their estates is unfounded. *Wilson* v. *Roach*, 4 Cal. 366.

4. The probate court is a court of special and limited jurisdiction: most of its general powers belong to a court of chancery, which still retains all of its jurisdiction, and persons not parties to the settlement of an account in the probate court may disregard the account and proceed against the administrator by bill. *Clarke* v. *Perry*, 5 Cal. 60.

5. The probate court has jurisdiction to try and determine issues of fact arising in proceedings before it, and it may send such to the district court to be passed upon as the probate judge is unwilling to pass his judgment upon; or where, from the great conflict of evidence, a reasonable doubt must exist in his mind as to which side has the right, subject to review by the supreme court. *Keller* v. *Franklin*, 5 Cal. 433.

6. Over issues of fact joined in the probate court, the jurisdiction of the district court shall be unlimited; but this cannot be said to deprive the probate court of its jurisdiction. *Ib.* 434.

7. A probate judge has no jurisdiction to order an administrator who resigned to pay the money in his hands into court. *Wilson* v. *Hernandez*, 5 Cal. 443.

8. It does not appear that there ever was a probate court in California prior to the conquest, and the probating of a will was a proceeding unknown to the laws and customs of California. *Castro* v. *Castro*, 6 Cal. 161; *Grimes* v. *Norris*, 6 Cal. 625.

9. The probate court is an inferior court, and therefore cannot take jurisdiction, or administer remedies other than those given, and in the manner provided by statute. *Grimes* v. *Norris*, 6 Cal. 625.

10. In pleading the judgment of a probate court, it being a court of limited and inferior jurisdiction, it is necessary to set forth the facts which give jurisdiction. *Smith* v. *Andrews*, 6 Cal. 654.

11. So much of the act of 1855 as provides for the transfer to the district court of issues of fact already decided in the probate court is unconstitutional and void. *Deck's Estate* v. *Gherke*, 6 Cal. 669.

12. The power of the probate judge to remove, in his discretion, an administrator for any of the causes named in the statute, will not be interfered with by the appellate court, unless it should be clearly shown that there has been a gross abuse of discretion. *Ib.*

13. A suit for the foreclosure of a mortgage is peculiarly an equity proceeding; and when a district court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief, and for this purpose to decree and execute a sale of the mortgaged premises. But when the claim has been presented to the administrator and probate court, and allowed, it is otherwise. *Belloc* v. *Rogers*, 9 Cal. 129.

14. A sale of property under an order of the probate court is a judicial act, and therefore not within the statute of frauds; it is in substance similar to a decree in chancery for the sale of specific property. *Halleck* v. *Guy*, 9 Cal. 195.

15. The probate court has no right to accept the resignation of an administrator until he has settled his accounts with the estate. *Haynes* v. *Meeks*, 10 Cal. 116.

16. Although probate courts are of limited and special jurisdiction, still no great

strictness should be required as to the manner of obtaining facts in the record. *Ib.* 117.

17. The probate court does not lose its jurisdiction over a subject of which it has taken cognizance by adopting the proceeding of an issue whereby to determine the issue advisedly; the finding of a jury is merely in aid of its jurisdiction by settling the facts and thus furnishing the material upon which to act. *Pond* v. *Pond*, 10 Cal. 500.

18. Issues of fact are sent from the probate to the district court not as from an inferior to a superior tribunal, but for the sake of convenience, because the probate court has not the machinery of jury trial and its incidents. *Ib.*

19. There is no relation of inferiority in the constitution or powers of the probate court, as respects the district court. They are unlike, but within their respective spheres equal. They are both constitutional courts; no appeal lies from one to the other. *Ib.*

20. An administrator filed in the probate court his account for final settlement, and an issue of fact was made thereon, which was certified to the district court for trial, and trial was had, the jury finding on each issue, and the judge rendering his decision on such findings, and this was certified back to the probate court, which court refused to give effect to the decision and judgment of the district court, but gave judgment on such findings as it construed them: held, that there was no error in the judgment of the probate court. *Ib.* 502.

21. Upon the death of the head of the family, it is made the duty of the probate court to set apart the homestead, for the benefit of the wife and legitimate children of the deceased. *Estate of Tompkins*, 12 Cal. 125.

22. The jurisdiction of the probate court over testamentary and probate matters is not exclusive. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains its jurisdiction. *Deck's Estate* v. *Gerke*, 12 Cal. 436.

23. Citation to heirs, to show cause against probate of will not served, is no objection to the jurisdiction of the probate court, if the heirs answer. The want of due service goes only to the service itself. *Abila* v. *Padilla*, 14 Cal. 106.

24. A decree of the probate court ordering a claim to be paid, rendered on petition of the administrator, and without objection by him, is final and conclusive, and cannot be assailed collaterally nor directly on the ground that it was rendered on insufficient evidence. *Estate of Cook*, 14 Cal. 130.

25. S. dies out of the State, leaving property in Santa Clara county, and the probate court thereof takes jurisdiction of the estate, and grants letters of administration to K. The widow subsequently files a petition to revoke the letters, on the ground that the probate court of San Francisco ought to have issued them, whereupon the administrator asks the court to transfer the cause to that court, representing that the widow and a majority of the witnesses resided there, and that the interest of several persons interested in the estate would be advanced by the transfer, to which both parties agreed. The court made an order of transfer. The probate court of San Francisco, on the papers being filed therein, refused to take jurisdiction of the cause, and ordered the papers back: held, that on these facts the court of Santa Clara could not divest itself of jurisdiction and vest it in the probate court of San Francisco, and that mandamus will not issue to compel the latter court to take jurisdiction. *Estate of Scott*, 15 Cal. 221.

26. The proceedings for the settlement of an estate and matters connected therewith are not civil actions within the meaning of sections eighteen to twenty-one of the practice act. *Ib.*

27. An order of a probate court setting aside a judgment of that court refusing to admit a will to probate is not an appealable order, because not within section two hundred and ninety-seven of the act to regulate the settlement of the estates of deceased persons. *Peralta* v. *Castro*, 15 Cal. 511.

28. W. died, leaving a widow and three minor children. The widow administered, and, as administratrix, presented a petition to the probate court, stating that she had agreed to sell the real estate of the intestate to the plaintiff for $3,000, and to procure an order of the court for the sale, asking the court to confirm this agreement; and asking further, that, if the court should refuse so to confirm, then for

a general order of sale upon the petition, which sets up other facts usual in such cases. The court made an order to show cause, etc., and at the same time appointed a guardian for minor and absent heirs, who, on the same day, consented to a decree of sale. No service of the order to show cause was made on the heirs. This decree confirms the agreement with plaintiff, directs a deed to be made to him, and afterwards proceeds to order a rule upon the heirs to show cause why a sale at public auction should not be made. Afterwards a second decree of sale was made in the usual form: held, that this agreement for a private sale did not render the decree of the court for a public sale void; that, although this agreement could not bind the estate, yet it was not against public policy and void. *Stuart* v. *Allen*, 16 Cal. 478.

29. Held, further, to make such agreement void as against public policy, the necessary effect of it must be to contravene some positive right or duty; that the duty of the administratrix is not necessarily inconsistent with an agreement to ask an order of sale upon consideration that a purchaser will give an agreed sum at the sale; that so far as her own interest was concerned, there was no objection to such an arrangement, and if the sale was to be public, probably no good reason exists for holding that the administratrix should not provide or assure herself in this way, that if sold, the property would bring a reasonable price, before proceeding to take steps to have the sale ordered—the propriety of ordering the sale and confirming it afterwards being still left to the court, uninfluenced by any such agreement. *Ib.*

30. Held, further, that the decree is not void because of the defect in the petition, which prays not simply for a decree of sale—the proper course—but seeks, as its main object, the confirmation of the agreement for a private sale to plaintiff; that, though the petition was demurrable for this cause—asking, as it did, what the court could not grant—yet, as the petition presented all the facts necessary to give the court jurisdiction of the matter of sale, it was sufficient to support the decree when attacked collaterally. *Ib.*

31. Held, further, that the decree and proceedings are not void, on the ground of inconsistency, in this: that the first order confirms the agreement with plaintiff, and then requires the parties to show cause why the land should not be sold; and the second decree orders the property to be sold, as usual in such cases; that this course was an irregular and improper exercise of jurisdiction; but that these irregularities and defects must be corrected on appeal, and cannot be indirectly attacked. *Ib.*

32. The court had no power to confirm this private sale, and the order to that effect was void; but this act of the court, though an assumption of power, did not divest it of its rightful powers. It had to order a sale of the land, and this power was exercised by its final or second decree. *Ib.* 501.

33. The power of the probate court to order a sale of the real estate of the deceased results from the fact that the personal estate in the hands of the administrator is sufficient to pay debts. *Ib.*

34. To the exercise of jurisdiction, in ordering a sale of real estate, it is not necessary that there should be a literal compliance with the directions of the statute. A substantial compliance is enough. Nor is it essential that there should be in the petition itself, and without reference to any other paper or thing, a statement of these facts. The main fact required is the averment of the insufficiency of personal assets, and mere formal defects in the mode of statement would not affect the jurisdiction. *Ib.*

35. So far as the question of jurisdiction is concerned, it is immaterial whether the statements of the petition be true or not; the jurisdiction rests upon the averments of the petition, not upon their truth. *Ib.*

36. Where the petition for the sale of real estate, after setting out the debts, proceeds, "that the personal property of said estate, which will appear by reference to the inventory now on file, is not more than is sufficient for the use and support of the family of said decedent, and is wholly insufficient to pay said indebtedness, and that it is necessary to sell real estate to pay the same;" and after giving some further matter, concludes: "Petitioner further alleges, that the inventory heretofore filed gives a description of all the real estate of which the said intestate died seized, and the condition and value

thereof, which said inventory is made a part of this petition": held, that the petition contains a sufficient averment as to the "amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of," within the statute; that the reference to the inventory makes, for all purposes of the reference, the inventory a part of the petition, and the amount of the personal estate is shown by the inventory, as is also the value. *Ib.* 502.

37. The prayer of the petition in this case is in the alternative, and, therefore, the petition, as a pleading, was defective, but this defect does not go to the jurisdiction of the court; but, if the true construction of the petition be that it prays for a sale only in the event that the agreement with plaintiff is not confirmed, still, perhaps, even then, the jurisdiction of the court would not be affected. *Ib.*

38. Query, whether, under the act of 1851, relative to the estates of deceased persons, in the petition for the sale of real estate, which shows that the personal estate, whether disposed of or not, is insufficient to pay the debts, it be essential also to aver how much of the personal estate has been disposed of; or whether the sole jurisdictional fact is that required by the one-hundred and fifty-fourth section of the act, making the one hundred and fifty-fifth and one hundred and fifty-sixth sections thereof mere modes to give effect to the substantive power conferred in section one hundred and fifty-four, and hence—like other statutory means to carry out a power—merely directions to the court in the exercise of its jurisdiction, and not conditions to the existence of the jurisdiction. *Ib.*

39. In this case, the petition and inventory referred to therein are to be regarded as one paper, so far as concerns a statement of the facts which they contain; and when the petition states that the personal property of the estate, which will be shown by the inventory, is insufficient, this averment, though informal and indirect, is equivalent to saying that the personal estate mentioned in the inventory is still on hand, and, therefore, undisposed of. The statement is of a fact existing at the time of the filing of the petition—and that fact is, that the property of the estate is shown by the inventory, and is insufficient to pay the debts, etc.; and if it be the property of the estate, it has not been disposed of. *Ib.*

40. In cases of this sort, where titles to real estate will be injuriously affected by holding probate courts to great strictness of proceeding, a fair and liberal construction should be given to their acts, whenever it can be legally done. *Ib.* 503.

41. Taking the petition and inventory together, in this case, the description of the real estate is not so defective as to render the sale void upon its face. To require an accurate or exact description is too strict a rule. *Ib.*

42. Where upon petition by the administrator to sell real estate of the deceased, to pay debts, the usual order for minor and absent heirs to show cause, etc., was entered, and, on the same day, a guardian ad litem was appointed for such heirs, who, on the same day, appeared, and consented to an order of sale, which was accordingly then made: held, that this order of sale is not void on the ground that the order to show cause, etc., was not served on the minor heirs, and that the guardian was appointed and the order to show cause was made on the same day. *Ib.* 504.

43. The statute is silent as to the time when the guardian, ad litem, is to be appointed; and the order of sale is not void because a copy of the order for the minor heirs to show cause was not served on such heirs before said appointment. *Ib.*

44. After the guardian ad litem in this case had appeared and consented to an order of sale, the court had jurisdiction over the subject and the parties. At what time, after this, the court should act on the petition, was within its discretion. *Ib.*

See ADMINISTRATOR, ADMINISTRATOR PUBLIC, DEATH, ESTATES OF DECEASED PERSONS, WILL.

PROCESS.

1. Attendance upon any court as a witness, juror, or party only, exempts the person in attendance from arrest in a civil action, but not from obeying any ordinary

process of court. *Page* v. *Randall*, 6 Cal. 33.

2. A defendant who has not been served with process is not a competent witness for his codefendant in an action of trespass. *Gates* v. *Nash*, 6 Cal. 194.

3. In the service of process, the sheriff is responsible only for unreasonably or not reasonably executing it. He is bound to start, on the instant of receiving a writ, to execute it without regard to anything else. *Whitney* v. *Butterfield*, 13 Cal. 338.

4. Reasonable diligence in the execution of process depends upon the particular facts; whether for instance the writ be for fraud or because defendant is about to leave the State, or remove his property, or the like. *Ib.* 340.

5. Under the code, personal service of writs and process is made by delivering a copy to the party upon whom service is required. Independent of the statute, the mode would be by showing the original under seal of the court, and delivering a copy. *Edmondson* v. *Mason*, 16 Cal. 388.

See ARREST, ATTACHMENT, INJUNCTION, REPLEVIN, SUMMONS.

PROCHEIN AMI.

1. The code permits the wife to sue alone when the action is between herself and her husband, and takes away the necessity of suing by prochein ami. It is a remedial statute and must be beneficially construed. *Kashaw* v. *Kashaw*, 3 Cal. 321.

See HUSBAND AND WIFE, PARTIES.

PROCLAMATION.

1. Elections to fill vacancies occasioned by the death or resignation of an officer are special elections; and the proclamation of the governor required by statute is necessary to the validity of a special election. *People* v. *Porter*, 6 Cal. 28; *People* v. *Weller*, 11 Cal. 67; *People* v. *Martin*, 12 Cal. 410; *People* v. *Rosborough*, 14 Cal. 187.

2. An election which was ordered by the board of supervisors, to fill a vacancy in the office of county judge occasioned by the resignation of the incumbent, without proclamation of the governor, is invalid; and the office being vacant, can be properly filled by the appointment of the governor. *People* v. *Porter*, 6 Cal. 68; *People* v. *Martin*, 12 Cal. 411.

See ELECTION, GOVERNOR.

PROMISSORY NOTES.

See BILLS OF EXCHANGE.

PROTEST.

I. In general.
II. Of Bills and Notes.

I. IN GENERAL.

1. Plaintiff having protested against the sale of his property for taxes illegally assessed, purchased the property in order to protect it from a clouded title, made the payment under protest, and in a few days commenced suit for the recovery of the money: held, that this was sufficient notice to the officer to hold the fund, and the money could be recovered back. *Hays v. Hogan*, 5 Cal. 242.

2. The object of a protest against an illegal payment is to take from the payment its voluntary character, and thus conserve to the party the right of action to recover back the money. It is only available in cases of payment under decrees or coercion, or when undue advantage is taken of the party's situation. It has no

application to voluntary payments. *McMillan* v. *Richards*, 9 Cal. 417.

3. An ordinance for the improvement of the streets, passed by the council of of Sacramento before the time of the presentation of the protest, is not thereby invalid. The statute only inhibits the council from proceeding with the improvements in case of such protest. *Burnett* v. *City of Sacramento*, 12 Cal. 82.

4. Taxes not justly due, and paid under protest, may be recovered back by suit against the tax collector. *Falkner* v. *Hunt*, 16 Cal. 170.

II. Of Bills and Notes.

5. A guarantor of a promissory note is entitled to demand and notice of protest. *Riggs* v. *Waldo*, 2 Cal. 487; *Pierce* v. *Kennedy*, 5 Cal. 139; *Brady* v. *Reynolds*, 13 Cal. 32; *Geiger* v. *Clark*, 13 Cal. 580.

6. A promissory note made before the statute of 1851, (which makes the fourth day of July a nonjudicial day) which fell due on the first July, and was payable on the fourth; held, that notice of nonpayment on the third was premature, and ineffectual to charge the endorser. *Toothaker* v. *Cornwall*, 3 Cal. 146.

7. *If a note is payable in bank, notice of nonpayment may be given to the endorser on the evening of the day on which the note is payable, after the close of banking hours, and if not payable in bank, notice may be given on the evening of the day it is payable, at the close of the usual hours of commercial business.* *Toothaker* v. *Cornwall*, 4 Cal. 30; overruled in *McFarland* v. *Pico*, 8 Cal. 631.

8. In places where there are no regular hours of business, the notice may be given after sunset of the day of dishonor. *Toothaker* v. *Cornwall*, 4 Cal. 30.

9. An express notice of waiver of nonpayment is equivalent to an admission that the note has been presented, or need not be presented. *Matthey* v. *Galley*, 4 Cal. 63.

10. A notice of the dishonor of a note is sufficient if it appear or can be reasonably inferred from the notice that the note or bill has been duly protested for nonpayment, or has been dishonored. *Stoughton* v. *Swan*, 4 Cal. 213.

11. The second of a foreign bill of exchange drawn here payable at sight was presented to the drawee, and payment being refused, it was duly protested. Afterwards and before suit was brought, the first of exchange was paid to the holder, with interest and cost of protest: it was held, the drawer was released from the payment of damages for the dishonor of the second of exchange. *Page* v. *Warner*, 4 Cal. 395.

12. By the fifth section of the act concerning notaries, bills are made protestable, and by the tenth section the protest of the notary is expressly made evidence of demand, and nonpayment of notes and bills. *Connolly* v. *Goodwin*, 5 Cal. 221.

13. Where payment by the maker to the endorser is relied on as the excuse for want of demand and notice, it must be a payment directly and specifically for the note, and not as security for all transactions in the aggregate. *Van Norden* v. *Buckley*, 5 Cal. 284.

14. An endorser of a promissory note, after maturity, is entitled to demand and notice of nonpayment, before he is liable to pay. *Vance* v. *Collins*, 6 Cal. 439; *Beebe* v. *Brooks*, 12 Cal. 311.

15. At common law, promissory notes were not protestable securities; they are made so by our statute, and as a consequence the protest of them must be attended with all the incidents belonging to foreign bills of exchange. *Tevis* v. *Randall*, 6 Cal. 635.

16. Where the second of a set of bills of exchange was presented and protested, owing to the absence of the drawee, and the first of exchange arrived nine days after, and was paid with costs of protest of the second, and two months after suit was commenced on the protested bill: held, that in an action for malicious prosecution of said suit, the question whether the plaintiffs in said suit knew that the bill was in fact paid at the time when they commenced suit was a question for the jury. *Weaver* v. *Page*, 6 Cal. 684.

17. Notice of nonpayment may be dispensed with by express waiver, or by any act which will amount to a waiver. *Minturn* v. *Fisher*, 7 Cal. 574.

18. A notarial certificate of presentment and demand and of protest for non-

payment of a promissory note, taken from the record of the notary is admissible and is prima facie evidence of the facts contained therein, in like manner as the original protest. *McFarland* v. *Pico*, 8 Cal. 635.

19. The merchant who states that he has received notice of protest of certain paper, and the lawyer who offers to prove that notice of protest has been given to the endorser of the paper in suit, both mean the same thing, that the necessary steps have been taken to fix the liability of the endorser, namely: presentment, refusal of payment and notice given. *Ib.* 636.

20. No precise form of words is necessary to constitute the notice. It will be sufficient if it inform the party to whom it is given, either in express terms or necessary implication that the note has been duly presented at the maturity and dishonored. *Ib.*

21. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Kritzer* v. *Mills*, 9 Cal. 23.

22. Where a party signs a joint and several promissory note, he is not entitled to notice of demand and nonpayment, though in fact he signed as surety, and such fact was known to the payee. *Hartman* v. *Burlingame*, 9 Cal. 561.

23. Where a draft is drawn by the president and secretary of a corporation upon its treasurer, no notice of presentation and nonpayment is necessary to hold the corporation. The draft, in such cases, is only an order of the corporation upon itself. *Dennis* v. *Table Mountain W. Co.*, 10 Cal. 370.

24. Where a place of payment is named in a bill or note, it is not a substantial contract, and it is not necessary to allege and prove a demand at the place specified. *Montgomery* v. *Tutt*, 11 Cal. 327; overruling *Wild* v. *Van Valkenburgh*, 7 Cal. 167.

25. In an action upon a promissory note, payable "on demand after date," it is not necessary to show actual demand before bringing suit. The institution of suit is a demand. *Ziel* v. *Dukes*, 12 Cal. 482.

26. A notice to the endorser of a note of nonpayment is sufficient, if it appear that the endorser, at the time of receiving the notice, knew what particular piece of paper was referred to, and could not have been prejudiced by the failure to describe it, and this though the notice was verbal and the note neither produced nor described. *Thompson* v. *Williams*, 14 Cal. 162.

27. Where a note due January, 1857, was endorsed by the payee to the present holder November 26th, 1858, and he, November 29th, 1858, demanded payment of the maker, and verbally notified the endorser of such demand, and that he would be held on his endorsement, it is no objection to the notice that it did not state the time of demand. The demand was good if made within a reasonable time, and before the notice; otherwise as to notes endorsed before maturity. In such a case the notice must state the time of demand. *Ib.* 163.

28. If much time intervenes between demand and notice, in transfers after maturity, the question may arise whether the delay has not released the endorser. *Ib.*

29. A notice by the holder that he had demanded payment of that note, implies that payment was demanded of the person liable to pay, to wit: the maker; and the declaration that he intended to look for payment to defendant, the endorser, implies the fact of nonpayment. *Ib.* 164.

30. A notarial certificate of protest of a note is of itself presumptive evidence that the notary had authority from the proper parties to make the protest. *Gillespie* v. *Neville*, 14 Cal. 409.

31. A protest need not state that the persons requesting him to protest are the holders of the note or the agents of the holders. *Ib.*

32. An endorser of a note payable on demand, no demand being made until thirteen months after the endorsement to plaintiff, is prima facie not liable. The delay is unreasonable. *Jerome* v. *Stebbins*, 14 Cal. 458.

33. Notice left by a notary at the residence of an endorser of a note—he being absent at the time—describing the note, stating that it was protested by him for nonpayment, and that the holder looked to the endorser for payment, but not signed by any one, nor indicating in any way

from whom it proceeded, is insufficient to charge the endorser. *Klockenbaum* v. *Pierson*, 16 Cal. 376.

34. Such notice having been so left on Saturday, the day the note matured, the record shows that on Monday, in a conversation between the endorser and the notary, "something was said about the note," and that the notary informed the endorser that plaintiff was "its owner and holder:" held, that as a verbal notice, this conversation was insufficient; that a notice must inform the endorser, either expressly or by necessary implication, that the note has been duly presented at its maturity and discharged. *Ib.* 377.

See BILLS OF EXCHANGE, NOTARY.

PUBLIC ADMINISTRATOR.

See ADMINISTRATOR, PUBLIC.

PUBLIC LAND.

See LAND, MINES AND MINING, II.

PUBLIC POLICY.

1. A deed of conveyance from an Indian to a white person is a nullity on its face, and no one can derive title under it. Such a conveyance is contrary to the policy of the Spanish and American law, and is strictly forbidden. *Suñol* v. *Hepburn*, 1 Cal. 283.

2. Wagers, which tend to excite a breach of the peace, or are against good morals, or which are against the principles of sound policy, are illegal, and no contract arising therefrom can be enforced. *Bryant* v. *Mead*, 1 Cal. 444.

3. A contract not to navigate certain waters under a penalty is not against public policy, as creating a monopoly; it only licenses the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world besides are left at full liberty to enter upon the same enterprise. *California Steam Nav. Co.* v. *Wright*, 6 Cal. 262.

4. At common law, all contracts by which one obliged himself to do an act or omission tending to injure the public were void, and the general rule is, that contracts in restraint of trade are contrary to public policy. The stringency of this rule has been gradually relaxed as the reason for it—the security of mechanics and tradesmen—ceased. *Ib.*

5. Such a contract gives no monopoly—giving an exclusive enjoyment of the businesss only as against a single individual—while all the world beside are left at full liberty to enter upon the same enterprise. *Ib.*; 8 Cal. 590.

6. Where the defendant employed the plaintiffs to superintend the erection of a building of which he was one of the contractors, they cannot plead that it is against public policy that he should occupy two positions of which the interests were in conflict, in defense of an action brought by him for services as superintendent. *Shaw* v. *Andrews*, 9 Cal. 74.

7. There were pending before the board of U. S. land commissioners three cases—No. 58, Nos. 45 and 812. The claimants in No. 558 entered into a written agreement with V., the claimant, and B., his attorney of record, in cases Nos. 45 and 812, by which the former agreed to pay to V. a certain portion of the proceeds of the sales of that portion of the claim No. 558, known as the Miranda claim, the parties agreeing to appoint an agent to go on and make sales. Contemporaneous with this agreement was another between the same parties, by which V. and B. agreed to withdraw and discontinue claims Nos. 45 and 812 before said board, and also to cause to be withdrawn the depositions of Theodore Miranda and Francisca Miranda, taken before a commissioner in said case, No. 558, and on file therein; and to use their "best endeavors to procure the confirmation of said claim, No. 558." B. was the attorney for the Miranda claim, which was for the same land as claim No.

558. To defeat claim No. 558 he acted for the U. S. law agent in taking said depositions, which were important to the government in defeating claim No. 558, and he attempted to carry out his agreement to withdraw such depositions—though he was not directly retained by the government. V. and B. sue for the specific execution of the agreement; held, that such agreement is against public policy, and cannot be enforced; that B. could not, without a violation of his duty to the government as an attorney, carry out such agreement. *Valentine* v. *Stewart*, 15 Cal. 397.

8. If any part of the consideration of an agreement be void, as against public policy, the whole contract fails. *Ib.*, 404.

9. A mere intruder upon land could not set up the manner in which the owner acquired it, as being against public policy, as a ground for perpetually enjoining the purchaser from maintaining an action for the possession. *Treadwell* v. *Payne*, 15 Cal. 499.

10. W. died, leaving a wife and three minor children. The widow administered, and, as administratrix, presented a petition to the probate court, stating that she had agreed to sell the real estate of the intestate to the plaintiff for $3,000, and to procure an order of court for the sale, asking the court to confirm this agreement; and asking further, that if the court should refuse so to confirm, then for a general order of sale upon the petition, which sets up other facts, usual in such cases. The court made an order to show cause, etc., and at the same time appointed a guardian for minor and absent heirs who, on the same day, consented to a decree of sale. No service of the order to show cause was made on the heirs. This decree confirms the agreement with plaintiff, directs a deed to be made to him, and afterwards proceeds to order a rule upon the heirs to show cause why a sale at public auction should not be made. Afterwards a second decree of sale was made, in the usual form: held, that this agreement for a private sale did not render the decree of the court for a public sale void; that, although this agreement could not bind the estate, yet it was not against public policy and void. *Stuart* v. *Allen*, 16 Cal. 498.

11. Held, further, that to make such agreement void as against public policy, the necessary effect of it must be to contravene some positive right or duty; that the duty of the administratrix is not necessarily inconsistent with an agreement to ask an order of sale upon consideration that a purchaser will give an agreed sum at the sale: that so far as her own interest was concerned, there was no objection to such an arrangement, and if the sale was to be public, probably no good reason exists for holding that the administratrix should not provide or assure herself in this way that, if sold, the property would bring a reasonable price, before proceeding to take steps to have the sale ordered—the propriety of ordering the sale, and confirming it afterwards, being still left to the court, uninfluenced by any such agreement. *Ib.*

PUBLICATION.

1. An affidavit of the attorney of record for plaintiff, that defendant conceals himself to avoid service of process, is sufficient to obtain an order on defendant for service of the summons by publication. *Anderson* v. *Parker*, 6 Cal. 201.

2. The date of publication of notice to creditors, under our insolvent act, is the first day on which the notice is published. *Clarke* v. *Ray*, 6 Cal. 604.

3. A judgment obtained by publication of summons against a defendant out of the State in which the judgment is rendered, though it may be enforced against his property in that State, has no binding force in personam, and is a mere nullity when attempted to be enforced in another State. *Kane* v. *Cook*, 8 Cal. 455.

4. Under the code, after the expiration of six months, if the absent defendant fails to deny the allegations of the complaint, he is held to admit them as true, and cannot afterwards show their falsity. *Ware* v. *Robinson*, 9 Cal. 111.

5. When there is but one clerk in the office of a public newspaper, his affidavit of the publication of summons or notice in said paper is sufficient, and it is unnecessary for the affidavit to describe him as

principal clerk. *Gray* v. *Palmer*, 9 Cal. 639.

6. The requirement of the statute being positive, that in actions against a minor under fourteen years, personal service of summons must be made, in cases where he resides out of this State, and his residence is known to plaintiff, such residence should be stated in the affidavit for publication. *Ib.*

7. An affidavit which avers a cause of action against the defendant; that defendant cannot, after due diligence, be found in the State; that he was beyond the limits of the State; that summons has been issued, but the sheriff cannot find him; that defendant's residence is in the county where the summons was issued, and that defendant still has a family residing in said county; is insufficient to authorize the publication of the summons for only thirty days; it must be for three months. *Jordan* v. *Giblin*, 12 Cal. 102.

8. The provisions of the revenue act of 1857, which requires the tax collector to publish the delinquent tax list, giving the name of the owner, when known, of all real estate, etc., are not conditions precedent to the vesting of the tax. The obligation to pay the tax does not exist by the force of these provisions. The tax is a debt due from the property holder to the State, and these proceedings by publication, etc., are merely modes adopted by the legislature to collect them. If the property be omitted from the delinquent list, this does not discharge the property holder, but the defect may be remedied by the legislature. *Moore* v. *Patch*, 12 Cal. 271; *People* v. *Seymour*, 16 Cal. 345.

9. The act of 1858, dispensing with the publication required by the act of 1857, also dispensed with the proof of that fact. *Moore* v. *Patch*, 12 Cal. 271.

10. An affidavit for an order of publication of the summons upon the ground of the absence of the defendant from the State, is insufficient if it does not show that the defendant had left the State, or that any diligence had been used to ascertain his whereabouts beyond inquiring of a single individual; where there is no pretense that he was concealing himself to avoid service. *Swain* v. *Chase*, 12 Cal. 285.

11. A board of equalization has no power to raise the valuation of land as fixed by the assessor, without notice to the owner. The general notice of the sitting of the board by publication does not amount to the notice required, as it could scarcely be expected that every tax payer is to wait upon the board from the first Monday in August until the second Monday in September, all the time, to see if his taxes are increased. *Patten* v. *Greene*, 13 Cal. 329.

12. The offer of a reward or compensation by public advertisement either to a particular person or class of persons, or to any or all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding contract. Until performance, the offer may be revoked at pleasure. *Ryer* v. *Stockwell*, 14 Cal. 137.

13. Such advertisements, upon acceptance of their terms and performance of the services, become written contracts. *Ib.*

14. A tax collector has power to contract for publishing the delinquent list of tax payers so as to bind the county for the payment of the price. He is the agent of the county in this respect, and for any reasonable exercise of the agency the county is responsible. *Randall* v. *Yuba County*, 14 Cal. 221.

15. And where he did so contract with plaintiffs, who publish the list and sue the county for the price, the fact that the tax collector has assented to a contract previously made or attempted by the supervisors with another party for publishing the list is not enough to affect plaintiffs, if they had no notice of it; and evidence of such assent was properly ruled out. *Ib.* 222.

PUEBLO.

1. Before the military occupation of California, by the army of the United States, San Francisco was a Mexican pueblo or municipal corporation, and was invested with title to the lands within her boundaries. *Cohas* v. *Raisin*, 3 Cal. 453;

Welch v. *Sullivan*, 8 Cal. 188; *Hart* v. *Burnett*, 15 Cal. 615.

2. Where a plaintiff sues for a lot in the former pueblo of San Francisco, and deraigns his title from the city, it is prima facie evidence of title. *Seale* v. *Mitchell*, 5 Cal. 402.

3. The authority to grant lands in the city of San Francisco was vested in the ayuntamiento, and in the alcalde or other officers who at that time represented it, or had succeeded to its powers and obligations. *Hart* v. *Burnett*, 15 Cal. 616.

4. The official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers as here defined and explained, will be presumed to have been done by lawful athority. *Ib.*

5. *Hart* v. *Burnett*, 15 Cal. 530, holding—first, that San Francisco was at the date of the conquest and cession of California, and long prior to that time, a pueblo, entitled to and possessing all the rights which the law conferred upon such municipal organizations; second, that such pueblo had a certain right or title to the lands within its general limits, and that the portions of such lands which had not been set apart or dedicated to common use, or to special purposes, could be granted in lots, by its municipal officers, to private persons in full ownership; third, that the authority to grant such lands was vested in the ayuntamiento, and in the alcaldes or other officers who, at the time, represented it, or who had succeeded to its "powers and obligations;" fourth, that the official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority, affirmed. *Payne* v. *Treadwell*, 16 Cal. 228.

6. A grant by an alcalde of a town lot in San Francisco, after the conquest and cession of California, down to the incorporation of the city, in April, 1850, will be presumed, until the contrary be shown, to be within the authority of such alcalde, and the lot granted will be presumed to be within the limits of the pueblo. *Ib.* 232.

7. The powers and authority which had been conferred by law upon municipal officers of the pueblo to grant pueblo lands, were not suspended, ipso facto, by the war with Mexico, or by the conquest, and the fact that such officers, during the military occupation, and after the complete conquest and cession, were Americans, or held their office under American authority, did not change the powers and obligations which, by the existing laws of the country, belonged to such municipal officers. And the same presumptions attach to their grants of lots, whether made before or after the conquest and cession. *Ib.* 240.

8. Where land within the general limits of the pueblo of San Francisco, and also within the limits of the old "Mission," was granted to an individual by the governor and departmental assembly, in 1839–40, before the "Mission" had been entirely secularized, it would seem to have been, at the date of the grant, exempt from the exercise of pueblo rights over it, and must be presumed to be grantable, just as any other land previously occupied by the mission establishments, but not exclusively dedicated to pious uses. *Brown* v. *City of San Francisco*, 16 Cal. 460.

See ALCALDE, GRANT.

PUIS DARREIN CONTINUANCE.

1. Evidence of the discharge of the debt sued, by transactions subsequent to the filing of the answer, is admissible only under the plea of payment puis darrein continuance. *Jessup* v. *King*, 4 Cal. 332.

QUO WARRANTO.

1. This writ is to prevent the usurpation of any office, franchise or liberty, as also to afford a remedy against corporations for a violation of their charters, tending to a forfeiture thereof. *Ex parte the Attorney General*, 1 Cal. 87.

2. From the exercise of the remedies which this writ affords, juries are to be empanneled to try the various issues of fact which, from the nature of the investigation, would be a wide range, and of the most exciting character. *Ib.*

3. The constitution has not clothed the supreme court with the powers and jurisdiction of the court of king's bench in England. *Ib.*

4. The supreme court is strictly an appellate tribunal, and has no original jurisdiction except in cases of habeas corpus; and consequently is not empowered to issue a writ of quo warranto for the purpose of inquiring by what authority a person exercises the duties of an office. *Ib.* 88.

5. The superior court of the city of San Francisco has no jurisdiction of proceedings by quo warranto, and a judgment of that court by which the right to an office was determined in these proceedings was reversed on appeal. *People* v. *Gillespie*, 1 Cal. 343; *People* v. *King*, 1 Cal. 345.

6. The code provides a remedy against any person who usurps, intrudes into, or unlawfully holds or receives any public office, civil or military, or any franchise in the State. *People* v. *Olds*, 3 Cal. 175.

7. The distinction between writs of mandate and quo warranto, as held in England, is not abolished by the statutes of this State; but is fully recognized. *Ib.* 177.

8. An information in the nature of a quo warranto is the proper proceeding to try the title to an office. *People* v. *Scannell*, 7 Cal. 439.

9. In quo warranto, to determine the right to an office, an allegation that defendant is in possession of the office without lawful authority is a sufficient allegation of intrusion and usurpation. *People* v. *Woodbury*, 14 Cal. 45.

10. Quo warranto lies to test the right of a pilot appointed by the board of pilot commissioners. *Ib.* 46.

11. In quo warranto for an alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp and enjoy the office without a license, and also contains allegations as to the right of relator to the office: held, that these allegations as to relator's right cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office. *People* v. *Abbott*, 16 Cal. 364.

See OFFICE.

RAILWAYS.

1. Where the streets of a city are diverted from their ordinary and legitimate uses by special license to a private person for his own benefit, as to run a railway there, in the pursuit of a business which involves constant risk and danger, he is bound in the exercise of such right to use extraordinary care. In this a private railway differs from a public one. *Wilson* v. *Cunningham*, 3 Cal. 243.

2. If by the construction of a railroad through an enclosure of a farmer, it is made necessary to construct fences on either side of the road to protect his crops, the cost of such fences must be included in the compensation to be paid by the railroad company. *Sacramento Valley R. R. Co.* v. *Moffatt*, 6 Cal. 75.

3. Damages assessed for the value of land taken for a railroad should be paid to the true owner, if he recovers possession before the damages are paid by the company; although at the time of the damage a trespasser was in possession who had filed his claim to the damages. *Rooney* v. *Sacramento Valley R. R. Co.*, 6 Cal. 640.

4. Where a railroad company applies for the appointment of a commission to ascertain the value of and condemn land needed by it for right of way, and makes the parties in possession defendants to their application, the latter are entitled to have the land as determined by the commissioners paid to them, although third parties have given notice of the ownership of the land. *Sacramento Valley R. R. Co.* v. *Moffatt*, 7 Cal. 579.

5. A railway company cannot refuse to enter a transfer of stock in said company on their books, on the ground that the assignor of the stock is indebted to the company, unless the company had a lien upon the stock at the date of its transfer. *People* v. *Crockett*, 9 Cal. 114.

6. Steamboat and railroad companies, in propelling boats on the river and cars on the railroad, must provide all reasonable precautions, to protect the property of others, and they must also be properly used. Carelessness in either particular resulting to the injury of an innocent party will make the company liable. They are bound to temper their care according to

the circumstances of the danger. *Gerke* v. *California Steam Navigation Co.*, 9 Cal. 256; *Hull* v. *Sacrameto Valley R. R. Co.*, 14 Cal. 388.

7. In an action against a railroad company for running over a horse and killing him, the plaintiff has the right to prove the custom of the country "to permit domestic animals to roam at large upon the uninclosed commons," where the defense is negligence on the part of the plaintiff in thus allowing his horse to run at large. *Waters* v. *Moss*, 12 Cal. 538.

8. The rule of common law, which requires owners of cattle to keep them confined within their own close, does not prevail in this State. The common law was adopted only so far as it was not repugnant to the constitution and statutes of the State. *Ib.*

9. Under the act of April 28th, 1857, authorizing the supervisors of Yuba county to take stock in a railroad company, the stock may be taken in any railroad by which a railway connection shall be formed between Marysville and Benicia, or any point on the Sacramento river, at or near Knight's Ferry. The company in which the stock is taken need not be constituted for the express and only purpose of such connection, provided the effect of the work is to make the connection. *Pattison* v. *Supervisors of Yuba County*, 13 Cal. 189.

10. The fact that fire was communicated from the engine of defendant's cars to plaintiff's grain, with proof that this result was not probable from the ordinary working of the engine, is prima facie proof of negligence sufficient to go the jury. *Hull* v. *Sacramento Valley R. R. Co.*, 14 Cal. 388.

See COMMON CARRIERS.

RAPE.

1. On a trial for rape, where the prosecutrix is the only witness, evidence that she had committed acts of lewdness with other men is admissible, as tending to disprove the allegation of force and total absence of assent on her part. *People* v. *Benson*, 6 Cal. 222.

2. It seems that proof of particular acts of lewdness should be admitted in preference to general reputation which may be good or bad, either deservedly or undeservedly. *Ib.* 223.

3. If these particular instances of lewdness are admissible, it is immaterial by whom they are proven, and it is unnecessary to question the prosecutrix as to them; they are introduced not so much to impeach her testimony as to do away with the presumption of the greatest reluctance and resistance on her part. *Ib.*

4. In such cases, the facts that there was no outcry, though aid was at hand and the prosecutrix knew it; that there was no immediate disclosure; that there was no indication of violence on her person, and that the act was committed at a time and under circumstances calculated to raise a doubt as to the employment of force, are put as strong circumstances of defense, not as conclusive, but as throwing doubt upon the assumption that there was a real absence of assent. *Ib.*

5. No case of this class of prosecutions should ever go to the jury on the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the court warning them of the danger of a conviction on such testimony. *Ib.*

See CRIMES AND CRIMINAL LAW.

RATIFICATION.

1. The law conferring other than judicial functions upon the court of sessions was unconstitutional and void, and any contract not incident to their judicial functions, made by a court of sessions under its provisions, is a nullity. Such a contract being void, could not be made valid by subsequent ratification of the board of supervisors. *Phelan* v. *Supervisors of San Francisco County*, 6 Cal. 540.

2. It is a well settled rule, that a principal who ratifies the acts of his agent must be made acquainted with the character of those acts, and unless all the circumstances are made known to him, the ratification is void. *Billings* v. *Morrow*,

7 Cal. 174; *Davidson* v. *Dallas*, 8 Cal. 244.

3. Where a municipal corporation has the power to perform an act, and in the execution thereof the prescribed form is not followed, it has the power subsequently to ratify and confirm the informal act, so as to make it as binding as if originally done in the proper manner. *Lucas* v. *City of San Francisco*, 7 Cal. 469.

4. Where the president of a corporation has an alleged power to make a contract to bind the corporation as agent, if such authority were doubtful, the acts of the corporation may amount to a ratification of the contract. *Shaver* v. *Bear River and Auburn W. and M. Co.*, 10 Cal. 401.

5. Ratification by a principal of the acts of his agent depends upon the knowledge of those acts on the part of the principal, and where the knowledge is partial, so will be the ratification. *Marziou* v. *Pioche*, 8 Cal. 535.

6. To adoption and ratification there must be some relation, actual or assumed, of principal and agent. *Ellison* v. *Jackson Water Co.*, 12 Cal. 551.

7. Acts of an agent without authority, subsequently ratified by the principal, bind the principal back to the inception of the transaction. *Taylor* v. *Robinson*, 14 Cal. 400.

8. But such ratification cannot defeat rights of third persons acquired between the act of the agent and the ratification of the principal, as attachments levied on property of the debtor after a sale by or to an agent. *Ib.*

9. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given; and where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. *Mc Cracken* v. *City of San Francisco*, 16 Cal. 624.

10. Where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance. *Ib.*

11. A ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able at the time to make the contract to which, by his ratification, he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself. *Ib.* 625.

RECEIPT.

1. A receipt given to one joint debtor on a note, for a part payment, coupled with the words "which is in full on his part on the within note, and the said A. B. is hereby discharged from all obligations on the same," is not such a release as will discharge the others. *Armstrong* v. *Hayward*, 6 Cal. 186.

2. A receipt acknowledging payment of a debt, whether in money or some other medium, may be explained or contradicted by parol. *Hawley* v. *Bader*, 15 Cal. 46.

3. In suit on an account against B. & S. as a firm, a receipt to B. alone signed by plaintiffs "in full for accounts and demands due us at this date" was offered in evidence by B., S. having made default, together with parol proof that the receipt was intended to embrace the account sued on: held, that the parol proof was admissible; that the term "all accounts" may be shown to cover firm as well as personal indebtedness. *Ib.*

See PAYMENT.

RECEIVER.

1. Where the allegations of a bill are general in their nature, and the equities are fully denied by the answer, such a case is not presented as will justify the appointment of a receiver, the withdrawal of the property from the hands of one intimately acquainted with all the affairs of the concern, and placing it in the hands of another, who may not be equally com-

petent to manage the business. *Williamson* v. *Monroe*, 3 Cal. 885.

2. Courts of equity have the power to appoint receivers and to order them to take possession of the property in controversy, whether in the immediate possession of the defendants or his agents; and in proper cases they can also order the defendant's agents or employees, although not parties to the record to deliver the specific property to the receiver. *Ex parte Cohen*, 5 Cal. 496.

3. The district court caused the parties assignees in insolvency to be served with a rule to show cause why they should not be ordered to deliver certain property in their possession to the receiver, appointed in a case to which they were not parties; and in obedience to the rule, they appeared and contested the matter before the court: held, that when they appeared and filed their answer to this rule, the court acquired full jurisdiction over their persons as well as the subject matter. *Ib.*

4. In a foreclosure suit, the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed pending the litigation. *Guy* v. *Ide*, 6 Cal. 101.

5. When in another proceeding for the protection of the creditor's property, instituted by one of the insolvent firm against his partners in the same court, an order is made that the assignees in the insolvent proceedings pay over the fund to a receiver appointed by the court, it is no answer or defense that the fund had been attached in their hands in actions brought by the creditors, or that it had been attached in the hands of a former receiver appointed by the same court, from whom they, under a like order, had received it. *Adams* v. *Haskell*, 6 Cal. 116.

6. Receivers or other custodians of money in the hands of a court, who are receivers except in name, as they are bound to obey the orders of court in their relation to the fund, as well as regards its safe custody as its return, are correlatively entitled to the protection of the court against loss for disbursements which were necessary and proper, and such as a reasonable and prudent man, acting as receiver, would have been justified in expending. *Adams* v. *Haskell*, 6 Cal. 477.

7. An order of court directing a referee "to ascertain and report the amount of disbursements and expenses made with or under the direction and authority of the court," by a receiver or custodian of money in the hands of the court, is too narrow to do him justice, and should be so enlarged as to allow for all reasonable and proper expenses incident to the receivership. *Ib.*

8. In a case where one partner has filed his bill for a dissolution of the partnership and the appointment of a receiver, it seems that until a dissolution has been judicially declared, and a receiver ordered to make a pro rata distribution of the assets among the creditors, they are not prevented from resorting to adverse proceedings and thereby gaining a preference. *Adams* v. *Hackett*, 7 Cal. 199; *Adams* v. *Woods*, 8 Cal. 156; 9 Cal. 26; *Naglee* v. *Lyman*, 14 Cal. 456.

9. Upon the application of a receiver in the suit for dissolution, he can obtain the necessary proceedings for procuring a correct application of the balance of a judgment held by the partnership against a third party, after paying the judgment creditor of the partnership. *Adams* v. *Hackett*, 7 Cal. 204.

10. Where the plaintiff filed his bill as receiver of an insolvent firm to foreclose a mortgage given to plaintiffs in that capacity, to secure a certain certificate of deposit for one thousand dollars, originally deposited by the receiver, and defendants admitted the debt, but claimed that the amount is to be distributed pro rata among the creditors of the insolvents whom the plaintiff represents; that the claims of the creditors have been filed and reported upon; that defendants are large creditors of the insolvents, and that they will, upon the distribution of the assets, be entitled to fifty thousand dollars as their dividend, and that defendants have advanced a further sum to the former custodians of the assets of about fifty thousand dollars, which they pray to have ascertained, and the whole amount set off against the certificate of deposit, and until then that plaintiff be restrained: held, that a court of equity will not compel them to pay the money into court, which they would immediately be entitled to receive back, nor will it put them to the cost of so large a judgment, but will order an account and allow the set-off. *Naglee* v. *Palmer*, 7 Cal. 547.

11. Where the plaintiff filed a bill in

equity for the appointment of a receiver and other relief, and the court refused to appoint a receiver on condition that defendant filed a bond to account as receiver, which defendant did, a judgment for twenty thousand dollars was rendered against defendant in this suit, and proper demand being made and refused, suit was brought by plaintiff on the bond, which was made payable to the people of the State of California: held, that the plaintiff could recover thereon. *Baker* v. *Bartol*, 7 Cal. 553.

12. A receiver is appointed on behalf of all the parties who may establish rights in the cause, and the money in his hands is in custodia legis. *Adams* v. *Woods*, 8 Cal. 315.

13. A receiver is an indifferent person as between the parties, and is an officer of the court and not to be disturbed by any person, without the special leave of the court. *Ib.*

14. In a suit for a dissolution of partnership, the appointment of a receiver is only a means to attain the end contemplated by the plaintiff; and so is the employment of counsel by the receiver. *Ib.* 316.

15. A receiver having the right to stipulate with the counsel employed by him that the counsel shall rely upon the allowance made by the court for his services, it is the duty of the receiver to report, among his disbursements, the claim of the counsel, leaving the amount to be fixed by the court, and if the counsel or any other person employed by the receiver feels aggrieved by the order of the court thereon, he can appeal therefrom. *Ib.*

16. A receiver is an officer of the court, and property in his hands is in the custody of the law; but it is equally true that he holds it for whoever can make out a title to it. *Adams* v. *Woods*, 9 Cal. 28.

17. Under the statute, the county judge may grant an injunction in cases in the district court but he cannot appoint a receiver, at least, not as a thing distinct from the injunction. *Ruthrauff* v. *Kresz*, 13 Cal. 639.

18. The transfer to a receiver by order of court, of the effects of an insolvent in the suit of a judgment creditor, is not an assignment absolutely void under the insolvent act of 1852, according to any decisions of this court, but only void as against the claims of creditors. *Naglee* v. *Lyman*, 14 Cal. 456.

19. Generally, a receiver can pay out nothing except on an order of the court; but there are exceptions to the rule; nor will he be denied reimbursement in every case in which he neglects te obtain the order, especially in a court of equity. *Adams* v. *Woods*, 15 Cal. 207.

20. Where a receiver was authorized by order of the court appointing him to prosecute suits for the recovery of assets of the estate he represents, and certain important mercantile books belonging to such estate being lost, the receiver paid $1,127 for their recovery, without an order of court: held, that he was entitled to a credit for this sum as part of the necessary or appropriate expenditures of his office. *Ib.*

21. In suit by a stockholder against a corporation and its officers, praying for their removal, and for an account and settlement of the affairs of the corporation, the decree, after a full hearing on the merits, was in accordance with the prayer, and also appointed a receiver to take charge of the property of the corporation until the further order of the court; collect money due or to become due it; sell certain stock and pay the proceeds in accordance with the decree, etc.: held, that this provision in the decree does not destroy its effect as a final decree, and that an appeal lies therefrom. *Neall* v. *Hall*, 16 Cal. 148.

22. A court of equity has no jurisdiction over corporations, for the purpose of restraining their operations or winding up their concerns. Such court may compel the officers of the corporation to account for any breach of trust, but the jurisdiction for this purpose is over the officers personally, and not over the corporation. Hence, in this case, it was error in the court below to appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation. *Ib.* 150.

RECOGNIZANCE.

1. The respondents were bail in a recognizance, conditioned for the appear-

ance of M. to answer at court, upon an indictment found againt him on the nineteenth of April, 1852. M. appeared at the proper time, which was the June term following, and on the seventeenth of June moved to quash the indictment, for causes assigned, which was ordered for the court. Another indictment, on the same charge, was found by the grand jury, then in session, at the same term, on the eighteenth of June, upon which, M. being called, made default. Afterwards, suit was brought upon the recognizance against the bail, and judgment obtained thereon: held, that the bail were entitled to relief against the judgment. *People* v. *Lafarge*, 3 Cal. 134.

2. Where a bail bond is given to appear and answer an indictment, the complaint must aver that the indictment was found, or is pending. *People* v. *Smith*, 3 Cal. 272.

3. If the condition be to appear "whenever the indictment may be prosecuted," and there is no averment in what court it was prosecuted, it is error; and a loose statement that the accused was called "in the court of sessions" is not sufficient. *Ib.*

4. The district attorney can bring suit against bail at any time after the adjournment of the term at which the recognizance was declared forfeited. *People* v. *Carpenter*, 7 Cal. 403.

5. Sureties on a bail bond cannot avail themselves in defense to an action thereon of an insufficiency of the justification of the undertaking. *Ib.*

6. A bail bond need not state in what court the defendant shall appear, as the law provides in what court he shall be tried. *Ib.*

7. Where the defendants were sureties in a recognizance for the appearance of one H., who was charged with the crime of receiving two mules alleged to have been stolen, and an indictment was found against H. for "receiving stolen goods:" held, that it does not follow from this general description of the indictment that it was for the same crime mentioned in the recognizance. *People* v. *Hunter*, 10 Cal. 503.

8. Where an assignment of a note and mortgage has been made to the plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage, and a decree of foreclosure in such case, with directions to pay the money into court to await the further decree of the court, is proper, or at least, there is no error in such a decree to the prejudice of the defendants. *Hunter* v. *Leran*, 11 Cal. 12.

9. A judgment entered on the forfeiture of a recognizance is the property of the State, and the legislature may release the same, in such form and on such conditions as it thinks proper to prescribe. *People* v. *Bircham*, 12 Cal. 54.

10. In suit in the district court, on a bond given in the court of sessions for the appearance there of a party indicted for misdemeanor—the court of sessions having declared the bond forfeited for non-appearance—the sureties cannot defend on the ground that the judgment of forfeiture was erroneous. That judgment cannot be thus revised. *People* v. *Wolf*, 16 Cal. 385.

11. The question, whether a party indicted for misdemeanor has an absolute right to appear by attorney and defend, so as to prevent the forfeiture of his bond, not passed on. *Ib.* 386.

RECORD.

On Appeal, see Appeal, V, 1; see Recorder, County; Registration.

RECORDER, CITY.

1. The recorder of the city of Sacramento has no jurisdiction in cases of forcible entry and unlawful detainer. *Cronise* v. *Carghill*, 4 Cal. 122.

2. The recorder of the city of San Francisco has a right to punish for the crime of assault and battery, as fixed by the act of April 18th, 1850. *People* v. *Ah King*, 4 Cal. 307.

3. Fines properly imposed in the court of a mayor or recorder of a city, or before any municipal officer of the corporation,

must be paid into the treasury of the city or other corporation. *People* v. *City of Sacramento*, 6 Cal. 425.

4. The recorder of the city of San Francisco is authorized by law to take acknowledgments of mortgages and conveyances. *Hopkins* v. *Delaney*, 8 Cal. 87.

5. City recorders are not within article six, section two, of the constitution, inhibiting judicial officers, except justices of the peace, from taking fees. *Curtis* v. *Sacramento County*, 13 Cal. 292.

RECORDER, COUNTY.

1. In the absence of any statute regulation requiring a record of the selection of a homestead or indicating any mode in which the intention to dedicate property as a homestead, shall be made known, the filing of a notice in the recorder's office of the county could have no legal effect, and would not be conclusive on purchasers or creditors. *Cook* v. *Mc Christian*, 4 Cal. 26.

2. A deed recorded January 30th, 1850, by a person acting as recorder, by virtue of an election by the people, without any authority of law, is not properly recorded. *Smith* v. *Brannan*, 13 Cal. 115.

3. Alcalde grants of beach and water lots in San Francisco, not recorded on or before the third of April, 1850, in some book of record in the possession and under the control of the recorder of San Francisco, are void. *Chapin* v. *Bourne*, 8 Cal. 295.

4. A verification to an answer is in form and substance an affidavit, and may be taken before a county recorder. *Pfeiffer* v. *Rhein*, 13 Cal. 648.

5. A certified copy of a deed from the county recorder's office, contained in the margin of the acknowledgment taken before a notary, and in the place where his seal is usually found, the words "no seal" thus: [No seal]—the conclusion of the acknowledgment being: "In witness whereof I have hereunto set my hand and affixed my official seal, the day and year," etc. The court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the notary's seal: held, that the court erred; that the words "no seal," instead of implying that there was no seal affixed, were a mere note by the recorder of the place of the notarial seal, which he probably had no means of copying. *Jones* v. *Martin*, 16 Cal. 166.

6. A recorder, in certifying to copies of deeds from his office, need not transcribe the notarial seal to the acknowledgment—the certificate of acknowledgment in this case stating that the notary did affix his seal. *Ib.*

See REGISTRATION.

REDEMPTION.

1. A subsequent judgment creditor having a lien has a right to redeem real estate sold by foreclosure of a previous mortgage in the hands of the purchaser. The statute should be beneficially construed. *Kent* v. *Laffan*, 2 Cal. 596.

2. Where land was sold at sheriff's sale, the proceeds of which did not cover the whole judgment, a party redeeming must pay the amount of bid, with statutory interest, and the residue* of the judgment constituting the lien. *Vandyke* v. *Herman*, 3 Cal. 298.

3. Without express written authority, neither the mayor or the commissioners of the funded debt of San Francisco, or any or either of them, by virtue of their office or otherwise, are authorized to redeem under the code, lands of the city sold under execution against her, nor can the city attorney ratify their act of redemption by plea after suit brought. *People* v. *Hays*, 4 Cal. 146.

4. The commissioners of the funded debt are not successors in interest, judgment debtors or judgment creditors, and therefore not statutory redemptioners, nor are they so in their individual capacity as citizens or tax payers. *Ib.* 148.

5. A payment to the sheriff for the redemption of land sold under execution cannot be made in certified checks; it must be in cash. *Ib.*

* The amendment of 1859 to the code of practice abrogates this provision, and permits the redemption by the payment only of the amount bid.

6. The statute allowing the redemption of property sold at judicial sales contemplates that the possession shall not change to the purchaser until the expiration of the time limited for redemption. *Guy* v. *Middleton*, 5 Cal. 392.

7. The statute allowing redemption of lands sold under execution is inoperative as to those cases where the debt upon which judgment and execution was obtained was contracted for before the passage of the act. *Seale* v. *Mitchell*, 5 Cal. 402.

8. A purchaser of land at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor, before the expiration of the six months allowed for redemption, and as often as the rent becomes due under the terms of the lease existing when he purchased. *Reynolds* v. *Lathrop*, 7 Cal. 46.

9. After a sale, and before the term of redemption has expired, the purchaser is entitled to collect the rents. *McDevitt* v. *Sullivan*, 8 Cal. 597.

10. A purchaser at sheriff's sale may have a lien upon the property prior to that of the redemption. The fact that he is the creditor does not divest the lien. He may be both a creditor and a purchaser, and still have a prior lien to that of the redemptioner. This can only be done on the principle that the legal estate is still in the judgment of the debtor until the delivery of the sheriff's deed. *Knight* v. *Fair*, 9 Cal. 118.

11. A creditor of the mortgagor, obtaining a judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem. *McMillan* v. *Richards*, 9 Cal. 413.

12. Such lien and right to redeem would be lost, where a prior judgment had been obtained by a third party against the mortgagor, under which his estate, subject to the mortgage, had been sold, and the time for redemption had elapsed, and conveyance had been executed. *Ib.*

13. The purchaser at an execution sale, before conveyance to him, has a right to redeem the property sold on the enforcement of a prior lien; after conveyance to him he has the same right as successor in interest to the debtor or mortgagor. *Ib.*

14. A redemption of property sold under a decree of foreclosure is accomplished by payment under protest, of the amount claimed to be due by the sheriff, though certain portions claimed are disputed. *Ib.* 416.

15. Where there is an absolute conveyance, with an attendant agreement to reconvey, the only difficulty which arises is to ascertain the fact whether the debt subsists or has been extinguished; and where there is no doubt on this point, courts of equity lean in favor of the right of redemption, and construe instruments as constituting a mortgage. *Hickox* v. *Lowe*, 10 Cal. 207.

16. D. purchased a lot of land at sheriff's sale on execution, and entered into possession and erected certain buildings thereon. On the twenty-fifth day of May, 1858, D. removed the buildings. On the same day the buildings were removed, the defendants on execution sold the premises to T., and a day or two after T. redeemed the lot from the sale, and then brought suit against D. to recover the value of the buildings; held, that as there was no evidence that the buildings were attached to the soil, T. cannot recover. *Tyler* v. *Decker*, 10 Cal. 436.

17. The right to redeem under a statute from a sale on execution exists in some instances where there is no equity, and in other instances in connection with the equitable right. Parties to the suit in which the judgment is rendered under which the sale is made, are restricted to the six months given by statute. Parties acquiring interests pending suits to enforce previously existing liens, or after judgment docketed or sale made, have no equity, and are confined to the rights given by the statute; but parties obtaining interests subsequent to the plaintiff, and before suit brought, who are not made parties in such suit, possess the equitable and the statutory right. They may redeem under the statute, or they may file their bill in equity. *Whitney* v. *Higgins*, 10 Cal. 554.

18. If an incumbrancer, prior to suit brought, not being made a party, is entitled to redeem, a fortiori, is a purchaser of the entire estate subsequent to the lien and before suit, entitled to make a redemption. *Whitney* v. *Higgins*, 10 Cal. 554; see *Tuolumne Redemption Co.* v. *Sedgwick*, 15 Cal. 526.

19. Where a mechanic's lien attached on certain premises, January 18th, 1856,

and a mortgage was placed on the same premises February 21st, 1856, and a suit was brought subsequent to the execution and record of the mortgage to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such suit a sale was made, and after the expiration of six months, no redemption being had, a deed was executed to the assignee of the sheriff's certificate: held, that the right of the mortgagees to redeem the premises by paying off the incumbrance of the mechanic's lien was not affected by the decree and the proceedings thereunder, and that the purchaser of the premises upon a decree of foreclosure of the mortgage, having received his deed upon such purchase, was entitled to the same right to redeem. *Whitney* v. *Higgins*, 10 Cal. 553.

20. A party entitled to redeem has a right to have ascertained the price at which his interest was sold, in order that he may redeem. *Raun* v. *Reynolds*, 11 Cal. 20.

21. The equitable right to redeem property sold under a decree of foreclosure held by subsequent incumbrancers is merged into a statutory right, not by any force given to the language of the decree, but by the fact that they have had their day in court and an opportunity of setting up any equities they possessed. After the decree they stand as to their right of redemption in the same position as ordinary judgment debtors. *Montgomery* v. *Tutt*, 11 Cal. 317.

22. The payment by a judgment debtor of the judgment, after a sheriff's sale, extinguishes the lien, and the fact that he takes a transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. *McCarthy* v. *Christie*, 13 Cal. 81.

23. Time is not given for the purpose of enabling the debtor to make a profit out of the estate, but for the purpose of enabling him to raise the money to redeem. *Harris* v. *Reynolds*, 13 Cal. 517.

24. The redemption system is a highly artificial plan, devised with care by the legislature, and introducing new and specific rules in respect to judicial sales. *Ib.*

25. The purchaser at sheriff's sale of a water ditch is entitled to the rents and profits thereof from the date of the sale to the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant. *Ib.*

26. A party in possession of premises under sheriff's sale, and receiving rents and profits during the time for redemption, should in equity as between him and defendant in execution pay the taxes assessed while he is so in possession. If the owner does not pay them the statute requires the party in possession to pay. *Kelsey* v. *Abbott*, 13 Cal. 619.

27. A party claiming title of property by virtue of statutory redemption, must show strict compliance with the statute. *Haskell* v. *Manlove*, 14 Cal. 57.

28. To entitle a judgment creditor having a lien to redeem, he must serve upon the officer a copy of the docket of the judgment; a copy of the judgment is not sufficient. *Ib.*

29. If a party claim a sheriff's deed, as having redeemed property as successor in interest of the judgment debtor, his offer to redeem must have been made in that character. *Ib.* 58.

30. A certificate of the sheriff of the purchase of property, as that of the defendant in execution, is not sufficient to enable the holder to redeem as such successor, at least, not until the expiration of the six months. *Ib.*

31. Where a redemptioner under the statute pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. *McMillan* v. *Vischer*, 14 Cal. 240.

32. In such case the sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptionee. *Ib.*

33. Under our statute a redemptioner is not required to pay interest on the purchaser's bid, over and above the eighteen per cent., nor is he required to pay interest on the whole judgment of the purchaser, but only on the excess over and above the bid. *Ib.* 241.

34. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. *Ib.*

35. From sales under trust deeds to convey there is no equity of redemption, for there is no forfeiture. Performance of a trust carries out the contract of the parties. *Koch* v. *Briggs*, 14 Cal. 263.

36. The statutory lien of a judgment upon the real estate of a judgment debtor attaches only upon property in which such debtor has a vested legal interest. *People* v. *Irwin*, 14 Cal. 434.

37. A owes B a debt; to secure it, A and C jointly mortgage to B a piece of land owned by them in common. Subsequently A mortgages his undivided interest in the land to secure a debt to D. B forecloses against A and C and buys in the whole land, not making D a party. The time of statutory redemption having expired, B gets a sheriff's deed: held, that D as subsequent mortgagee may redeem A's but not C's interest in the land, and that the sale is final as to C's interest, D not being a necessary party to the foreclosure. *Kirkham* v. *Dupont*, 14 Cal. 563.

38. The redemption money of A's interest would be the amount of B's mortgage debt, with interest, etc., less one-half of the purchase money of the whole foreclosure sale. *Ib.* 566.

39. A subsequent mortgagee would have a right to redeem premises from a sale under a judgment upon mechanic's liens by paying the money justly due, interest, costs, etc., he not having been party to the suit by the lien holder. *Gamble* v. *Voll*, 15 Cal. 510.

40. The redemption act of 1859 is in substitution of the act of 1851, and applies to sales made after the passage of the act of 1859, though made upon judgments rendered before. *Tuolumne Redemption Co.* v. *Sedgwick*, 15 Cal. 522.

41. The fact that judgments were recovered before the act of 1859 does not vest in the holders of them the right to redeem from a sale made after the passage of the act upon any terms different from those prescribed by the act. If the right to redeem under the act of 1851 were an incident to any judgment rendered while that act existed, it was a portion of the remedy which might be taken away by the legislature at any time before the right had become vested by the party availing himself of it. *Ib.*

42. The right to redeem under the statute, and the mode of asserting the right, are mere creatures of the statute. The right is given to a judgment creditor, and if before a party becomes a judgment creditor the law be repealed, he has no claim to redeem, because he does not belong to that class of persons for which the remedy is furnished. *Ib.* 523.

43. The right to redeem land is no part of the contract of indebtedness. It is a new privilege given by statute. It is a provision made by statute for a future contract, by pursuing which a purchase of land may be made. But as this provision is only a matter out of which rights may grow, the provision may be repealed at any time before a party avails himself of it. *Ib.*

44. The legislature may give a particular privilege, or a right to contract on certain terms, or in certain circumstances, but it may repeal the provision, or deny the right, as a general rule, as fully and completely as it can give them; or it may alter the terms at its pleasure, subject only to this: that it cannot repeal or alter so as to affect those contracts which have been made during the existence of the act authorizing them. *Ib.* 524.

45. The statutory regulations as to redemption are mere provisions of sale, governing the course of the process and its effects. They do not touch the contract of indebtedness, which stands, as it stood before, a valid obligation to pay money, with the sanctions furnished by law for its enforcement. And a sale without any right of redemption is a valid and sufficient remedy for the enforcement of the contract. *Ib.*

46. An act denying a right of sale for the enforcement of the contract would probably be such a vital assault upon the obligation as practically to destroy it, and therefore be unconstitutional. But a repeal of a right of redemption—in other words, an act making a sale absolute instead of conditional—would not impair the contract. *Ib.* 525.

47. A debtor in default has no vested right to have his property sold in a particular way; and third persons, not parties to the contract, have no vested right to purchase the property of a common debtor sold at the instance of another creditor. *Ib.*

48. The doctrine of *Whitney* v. *Hig-*

gins, 10 Cal. 554, as to equitable right of redemption in favor of certain persons not made parties to a mortgage foreclosure, applied to a peculiar state of facts. *Ib.* 526.

49. Where plaintiffs, owners of certain judgments and decrees, had both the equitable and statutory right to redeem property sold, and exercised their right under the statute by redeeming from D., who had purchased under his own foreclosure, and then D., as assignee of other judgments, redeemed from plaintiffs: held, that plaintiffs did not lose their equitable right of redemption from the fact that they also asserted their statutory right—the subsequent redemption by D. leaving their claims unsatisfied. *Ib.* 527.

50. Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of *Wemple* v. *Pender*, and has not yet got a sheriff's deed: held, that injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession until the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; that if he chose to recognize the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff cannot complain—his rights not being affected by the proceedings, as he was not a party. *Pender* v. *Wemple*, 16 Cal. 106.

51. The proceedings for a foreclosure of the equity of redemption, as those terms are understood where the common law view of mortgages is maintained, are unknown to our system, so far, at least, as the owner of the estate is concerned. *Goodenow* v. *Ewer*, 16 Cal. 468.

52. A tenant of the mortgagor is not interested either in the claim secured nor in the estate mortgaged—that is, in the title pledged as security. He has not succeeded to such estate, or to any portion of it. He does not stand in the position of a purchaser. The estate remains in his lessor; he has only a contingent right to enjoy the premises. The right of the lessor to possession ends with the deed by which the sale of the premises is consummated; and the tenant's right to possession depends upon that of the lessor, and goes with it; and the tenant having notice, actual or constructive, of the mortgage, need not be made party to the foreclosure. *McDermott* v. *Burke*, 16 Cal. 590.

53. Possibly, a court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold on foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *Ib.*

REFERENCE.

1. A reference is a substitution for a jury, and a judgment should be had upon their report as upon a verdict, and a motion to set aside the report of referees is necessary before the appellate court be required to examine the report and set the same aside. *Gunter* v. *Sanchez*, 1 Cal. 48.

2. The finding of referees, like the verdict of a jury, ought to be final. *Gunter* v. *Sanchez*, 1 Cal. 49; *Walton* v. *Minturn*, 1 Cal. 362.

3. When the action is brought for the balance of an account, and the answer avers payment by a promissory note, and the plaintiff replies that he was induced to receive the note by fraud, the court held that it was one of those cases that the party was entitled to a trial by jury and it could only be referred by consent of the parties. *Seaman* v. *Mariani*, 1 Cal. 336.

4. The report of a referee should be taken advantage of by filing written objections to the entry of judgment thereon, or by a motion for a new trial, setting forth the grounds of the alleged error. *Porter* v. *Barling*, 2 Cal. 73.

5. The consent of a party to an order of reference must be in writing or entered on the minutes. *Smith* v. *Pollock*, 2 Cal. 94.

6. It seems that a stay of proceedings, granted on an appeal from an order of reference, is proper. *Ib.*

7. Our statute concerning referees is in aid of the common law remedy by arbitration, and does not alter its principles. *Tyson* v. *Wells*, 2 Cal. 130.

8. Exception must be taken to the rulings of a referee during the trial, and certified to by him. *Ib.*

9. If there be no exception taken to the ruling of a referee, and the rule of law by which he arrived at his conclusions be not disclosed, the court cannot disturb the report, and an order granting a new trial in such case will be reversed. *Tyson* v. *Wells*, 2 Cal. 130; *Grayson* v. *Guild*, 4 Cal. 125.

10. Referees have no power to allow parties to alter or amend pleadings after a case has been submitted to them. *De la Rira* v. *Berreyesa*, 2 Cal. 196.

11. Referees should exclude items barred by limitation if objected to. *Ib.*

12. Hearsay and irrelevant testimony should be excluded by referees. *Ib.*

13. A mandamus lies to compel the judge of a district court to enter judgment on the report of a referee. *Russell* v. *Elliot*, 2 Cal. 246.

14. The court may order a reference to ascertain the damages sustained by reason of an injunction issued without cause. *Ib.*

15. A party filing an undertaking to obtain an injunction, is deemed to have waived the right to insist on a trial by jury, and consented that the damages may be ascertained in the mode prescribed by the statute and an order of reference, is no violation of the constitutional right to trial by jury. *Ib.* 247.

16. An order of reference cannot be made without the consent of the adverse party, unless the statute requires it. *Benham* v. *Rowe*, 2 Cal. 261.

17. If a report of a referee contain sufficient on which to base a judgment, it is the duty of the court to enter judgment in accordance with the report, so far as concerns the matter referred, and not entertain any objection thereto except on a motion for a new trial, when the report can be set aside. *Headley* v. *Reed*, 2 Cal. 324.

18. If the report of a referee is not made immediately after the close of the testimony, it is deemed excepted to. *Ib.* 325.

19. A report of a referee can only be set aside on account of fraud, gross error of law or fact apparent on its face. *Ib.*

20. A referee has no right to bring in and file an amended report, and the case must be reviewed with reference to the original report. *Ib.*

21. The report of a referee under the code has the same legal effect as the award of an arbitrator. *Headley* v. *Reed*, 2 Cal. 325; *Grayson* v. *Guild*, 4 Cal. 125.

22. Where an entry was made upon the minutes, that "the parties came by their attorneys, and defendant by his attorney moved the court that the cause should be referred." That is a reference by oral consent in open court, entered on the minutes. *Bates* v. *Visher*, 2 Cal. 357.

23. A jury was waived by the parties and the cause submitted to the court. The trial made some progress, when on motion of the plaintiff's attorney, the case was referred "to ascertain the damages sustained by plaintiff:" held, that the case having been submitted to the court, it was the duty of the court to find upon the facts adduced by the parties, and not the facts in the report. *Geeseka* v. *Brannan*, 2 Cal. 519.

24. The statute does not require the referee to be sworn, consequently the imposition of an oath by the court would be of no effect other than to put it in their power to commit moral perjury without being amenable to the law. *Sloan* v. *Smith*, 3 Cal. 407.

25. Judgment is entered as a matter of course on the report of a referee, and the only mode to take advantage of error is to move to set the judgment aside, as on motion for a new trial. *Ib.*

26. The report of a referee, like the finding of a court, should state the facts found and the conclusions of law. Without this he arties would be remediless and their rights concluded in many cases by the arbitrary decision of a referee. *Lambert* v. *Smith*, 3 Cal. 409.

27. A case was submiteed to a referee to find the interest of R. and the value of such interest in a vessel and cargo. He found such interest and value in the ship but not in the cargo, and reported that he was unable, for want of evidence, to find

the value of R.'s interest in the cargo: held, that this was equivalent for the purpose of legal adjudication of finding no value whatever. *Montefiori* v. *Engels*, 3 Cal. 434.

28. A stipulation to refer the whole matter is a waiver of any objection that the motion for a new trial and to set aside the award was not made within the statute time. *Heslep* v. *City of San Francisco*, 4 Cal. 2.

29. An order of court is necessary to constitute a reference under the code, and no reference would be good, as such, without an order. *Ib.* 4.

30. A reference or arbitration, in which there is no order of court or agreement filed with the clerk or entered on the minutes, is a voluntary withdrawal of the case from the jurisdiction of the court, by which it looses all control over the case and has no authority to enter judgment upon the finding, except by consent of parties. *Ib.*

31. *Smith* v. *Pollock*, 2 Cal. 94, holding that a reference could not be had without the consent of the parties, applies to cases at common law in which the party was entitled to a jury trial, and does not extend to cases in equity. *Smith* v. *Rowe*, 4 Cal. 7.

32. The court may order a reference in equity cases without consent of parties. *Ib.*

33. When a case is referred to a referee, under the statute, to hear and determine the issues of fact and of law, and report the same to the court, and he makes his report wherein no errors of law or fact occur, and no exceptions are taken, the court below should not set aside the report and grant a new trial. *Grayson* v. *Guild*, 4 Cal. 125.

34. The report of a referee is the same as an award of an arbitrator. *Ib.*

35. When a report of a referee has been erroneously set aside, and a new trial granted, from which action the plaintiff appeals, the supreme court will correct both errors at the same time in a chancery case. *Ib.* 126.

36. Where the report of a referee disclosed some hesitation and doubt in arriving at conclusions of fact, and after the report had been made up, but before it was filed, the defendant applied to the referee for leave to introduce newly discovered evidence, which was refused from a doubt as to his power, he at the same time intimating to the court, in a supplemental report, that if the newly discovered evidence had been adduced on the trial, the result would probably have been different, it was held under the circumstances to be error to refuse a new trial. *Hoyt* v. *Saunders*, 4 Cal. 347.

37. A court can interfere and set aside the report of a referee, upon the same ground as it will proceed to set aside the verdict of a jury. *McHenry* v. *Moore*, 5 Cal. 92.

38. The report of a referee upon conflicting evidence must be treated in the light of a verdict of a jury, and will not be disturbed in this court upon an appeal from an order refusing to grant a new trial in the court below. *Ritchie* v. *Bradshaw*, 5 Cal. 229.

39. The report of a referee cannot be attacked except for error or mistake of law apparent on its face, or by motion for a new trial upon exceptions taken at the trial or the evidence certified. *Goodrich* v. *City of Marysville*, 5 Cal. 431.

40. The facts found in the report of a referee are conclusive in the absence of the testimony, or where the testimony is not properly brought before the court. *Ib.*

41. A trial before a referee should be conducted in the same manner as before a court, and the evidence should be embodied in a bill of exceptions and certified by the referee. *Ib.*

42. It is error for the court to set aside the report of a referee upon an examination of testimony which was not properly before it. *Ib.*

43. If the order of reference fails to direct a return of the evidence to the court, the party objecting to the report must see that such testimony as he relies on is properly certified. *Ib.*

44. It would be a gross abuse of discretion for a court to set aside a report of a referee, correct in all its parts, without any other apparent reason than the mere volition of the judge. *Ib.* 433.

45. When a referee admits the testimony of a witness against the objection of the defendant, such testimony cannot, after the case has been submitted, be thrown out, without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony. *Monson* v. *Cooke*, 5 Cal. 436.

46. Though a plea would be bad upon demurrer, yet if no objection be taken at the time, and the case be submitted to a referee, the defect of the plea is not sufficient to set aside his report. *Ritchie* v. *Davis*, 5 Cal. 454.

47. An order setting aside the report of a referee appointed to take an account, is merely interlocutory, and is not the subject of an appeal before final judgment or decree. *Johnston* v. *Dopkins*, 6 Cal. 84; *Baker* v. *Baker*, 10 Cal. 528.

48. An order of court directing a referee "to ascertain and report the amount of disbursements and expenses made with or under the direction and authority of the court," by a receiver or custodian of money in the hands of the court, is too narrow to do him justice, and should be so enlarged as to allow him for all reasonable and proper expenses incident to the receivership. *Adams* v. *Haskell*, 6 Cal. 477.

49. Trials before a referee are conducted in the same manner as before courts; and exceptions must be taken to the rulings of the referee, in the progress of the trial, in the same manner as they must be taken before a court, and such exceptions must be embodied in the report of the referee, or made part thereof by his proper certificate. *Phelps* v. *Peabody*, 7 Cal. 52.

50. Where a party failed to obtain the proper certificate of a referee, relying on the verbal assurance of the attorney on the other side, that he would agree to a statement, such party cannot be considered free from fault or negligence, and he cannot enjoin in equity the judgment against him. *Ib.* 53.

51. The fact that the referee in the proceedings supplementary to execution was the clerk of the attaching creditor, is not any considerable evidence of fraud, when the limited duties of the referee are considered. *Adams* v. *Hackett*, 7 Cal. 201.

52. The order of a referee in the proceedings supplementary should state simply that the property described should be applied towards the satisfaction of the judgment, in such manner as the court should direct. *Ib.* 202.

53. Where an action is tried by the court without a jury, or the whole case is referred to a referee, judgment follows, as a conclusion of law upon the facts found, and the time within which notice of the motion should be made dates from the entry of the judgment. *Peabody* v. *Phelps*, 9 Cal. 224.

54. Upon facts found, whether by report of the referee or special verdict of a jury, the direct action of the court must be invoked before judgment can be entered. Hence, the time within which the notice of motion to set aside the report or verdict must be given, should date from the filing of the report, or the rendition of the verdict. *Ib.*

55. The time within which a notice of motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, will depend on the character of the reference; whether it be special to report the facts, or general to report upon the whole issue. In the former case, the report has the effect of a special verdict; in the latter, it stands as the decision of the court, and judgment may be entered thereon, exceptions taken and rendered, as if the action had been tried by the court. *Ib.*

56. When the alleged error consists in the final conclusion of law or facts drawn from the testimony, and the evidence is certified to the court by the referee, the proper course is to move to set aside the report, and for a new trial. *Branger* v. *Chevalier*, 9 Cal. 362.

57. An order of reference cannot go beyond the pleadings of the parties, and when the referee excludes proper, or admits improper evidence, or does any other act materially affecting the rights of either party, during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report. *Ib.*

58. The whole issue in divorce cases cannot, by stipulation of parties, be referred; and where a reference is had, the referee cannot pass upon the testimony. If he make any statement or finding of facts, the court is obliged to disregard it, and base its decree only upon the legal testimony taken. *Baker* v. *Baker*, 10 Cal. 527.

59. The referee in divorce cases, under the statute, is simply a master to take testimony. *Ib.*

60. An order setting aside the finding of a referee in a divorce case, and sending the case back to the referee for further testimony, is interlocutory in its character, and not the subject of appeal. *Ib.* 528.

61. Where a reference is had to take an account, it is within the discretion of referees to open the case, after it had been once closed, for the purpose of receiving additional testimony. The exercise of such discretion, except in cases of gross abuse, will not be reviewed on appeal. *Marziou* v. *Pioche*, 10 Cal. 546.

62. The finding of the referee is conclusive as to the facts on conflicting evidence. *Knowles* v. *Joost*, 13 Cal. 621.

63. Failure to appear and prosecute a motion to set aside the report of a referee, and for new trial, is an abandonment of motion, and the order made denying the motion for such failure to appear is not the subject of review on appeal. *Mahoney* v. *Wilson*, 15 Cal. 43; *Frank* v. *Doane*, 15 Cal. 303; *Green* v. *Doane*, 15 Cal. 304.

64. Notice of motion for new trial given one day before judgment rendered, and six days after filing the report of the referee to whom the case had been sent to find the facts, is ineffectual for any purpose. If the trial terminated with the filing of the report, the notice was not in time; if it continued, in contemplation of law, until the entry of the judgment, the notice was premature, and the proceedings on the motion are void. *Mahoney* v. *Caperton*, 15 Cal. 314.

65. Where a party gets into possession of property, as a water ditch, under a sheriff's suit on foreclosure of mortgage, and the judgment on which such sale was made is afterwards reversed by the judge of the supreme court, and restitution of the property ordered, the court below may, on motion, order such party in possession to account before a referee for the rents and profits received by him—that is, for the sales of water, etc. It would be impracticable for a jury to settle the account, at least, without great delay and embarassment. *Raun* v. *Reynolds*, 15 Cal. 470.

See ARBITRATION.

REGISTRATION.

1. A prior recorded mortgage has priority of lien over a subsequent recorded mortgage, where the second mortgagee had notice of the existence of the first incumbrance; and this was so, as well before as since the enactment of the statute by which the common law was adopted in California. *Woodworth* v. *Guzman*, 1 Cal. 205.

2. Whether there was any officer of San Francisco authorized to record mortgages previous to the passage of the act of the legislature establishing recorders' offices, passed April 4th, 1850, with the effect of making them constructive notice to subsequent purchasers or mortgagees: query. *Ib.*

3. The object of laws which require deeds and mortgages to be recorded, is to prevent imposition upon subsequent purchasers and mortgagees in good faith, and without notice of prior deed or incumbrance, but not to protect them when they have such notice. *Ib.*

4. A court of equity will, as against the mortgagor, correct a mistake in the description of the mortgaged premises, as a matter of course; and a person claiming under the mortgagor, and having notice of a prior lien upon the premises, is in no better condition than the mortgagor himself. *Ib.*

5. The evident intention of the statute providing for the proof and registration of conveyances, is to protect subsequent purchasers without notice, either actual or constructive. *Call* v. *Hastings*, 3 Cal. 188.

6. The act of 1851, section twenty-one, gives to papers properly recorded the like effect as the originals, but it does not dispense with proof of execution. *Powell* v. *Hendricks*, 3 Cal. 430.

7. The statute requires the seal of the officer taking the acknowledgment to be attached as preliminary to filing the deed for registration; and without conforming strictly to the statute, the registration will not be of such a character as to charge constructive notice. *Hastings* v. *Vaughn*, 5 Cal. 318.

8. A certificate of acknowledgment of a deed, in the words "Before me personally appeared A B, to be the individual, etc.," is bad, and the record of the conveyance on such a certificate imparts no notice to third parties.* The omission might as well be supplied by the words "claiming"

*The statute of 1860, p. 179, authorizes a defective acknowledgment to be corrected by proceedings before the county judge; and the statute of 1860, p. 357, makes defective acknowledgments notice hereafter, the same as if the defect did not exist, so far as not to impair the obligation of contracts.

or "representing," as by "known" or "proved." There is no averment that the party making the acknowledgment is the person who executed it upon the personal knowledge of the officer. *Wolf* v. *Fogarty*, 6 Cal. 225; *Kelsey* v. *Dunlap*, 7 Cal. 162; *Henderson* v. *Grewell*, 8 Cal. 584; *Fogarty* v. *Finlay*, 10 Cal. 244.

9. The registration act abolished all constructive notice of unrecorded conveyances, but it did not do away with notice in fact. Possession, therefore, is not constructive notice of title, but it may be admitted in evidence along with other facts, to establish fraud or actual notice. *Mesick* v. *Sunderland*, 6 Cal. 315; *Stafford* v. *Lick*, 7 Cal. 489.

10. The intention of the registration act of this State was to protect the purchaser of the legal title against latent equities or mere executory agreements, and to abolish the presumption of notice arising from possession. *Mesick* v. *Sunderland*, 6 Cal. 315.

11. Section twenty-one of the act of March, 1851, giving to copies of papers from the county recorder's office the like effect as evidence as originals, if it can be obtained merely fixes the value of the copy as evidence when it is necessary to be introduced from the loss of the original. *Macy* v. *Goodwin*, 6 Cal. 582.

12. The twenty-fifth section of the act concerning conveyances, making the record of conveyances notice, is limited by its terms in its operation to subsequent purchasers and mortgagees. *Dennis* v. *Burritt*, 6 Cal. 672.

13. If, however, the recording act imparts notice to prior purchasers or mortgagees, it is but constructive notice, and insufficient to charge a prior mortgage with fraud in releasing portions of the mortgaged premises, retaining a lien on the balance, (of which part had been sold after the mortgage) but before his releases, so as to justify a court of equity to set the act aside. *Ib.* 673.

14. Where the defendant bought the property in question and recorded his deed, but by mistake the number and description of the lots were omitted in the record, and plaintiff subsequently bought the same lots of the same grantor, and afterwards the common grantor of both procured the record of defendants' deed to be amended by interlineation of the description: held, that the plaintiff had no notice of the previous conveyance of the property to defendant. *Chamberlain* v. *Bell*, 7 Cal. 294.

15. The design and intention of the registration act was to give constructive notice of the facts which appeared upon the face of the record. *Ib.*

16. As to the implied notice arising from the possession of a party under an unregistered deed, it is a question of bad faith, and it should be left to the jury whether the subsequent purchaser had actual notice or such means of notice as to make his negligence a species of fraud. *Bird* v. *Dennison*, 7 Cal. 305.

17. The grounds on which registry acts are based are, that the party who fails to record his deed places it in the power of his grantor to commit a fraud upon others, and the law holds him responsible as assisting the fraud. *Ib.*

18. The penalty for failing to record coveyances declared in the statute must be limited to conveyances, as defined by the statute, and cannot by implication be extended to instruments for the recording of which it makes no penalty. *Ib.* 307.

19. The forty-first section of the registration act requires conveyances made before the passage of the act to be recorded, and the penalty of failing to do so is the same as with conveyances made after the act is passed. *Stafford* v. *Lick*, 7 Cal. 486.

20. This section of the act is neither in violation of the constitution of the United States nor of this State, as it does not impair the obligation of contracts, but merely establishes what shall be constructive notice to third parties; nor does it divest vested rights, but only introduces a rule for the subsequent protection of the rights of parties. *Ib.* 487.

21. A party holding under an assignment of a recorded lease containing a mortgage clause, is bound to know the contents thereof, and is therefore subject to the mortgage, although the instrument is recorded in the book of leases, there being a privity of estate. *Barroilhet* v. *Battelle*, 7 Cal. 454.

22. Alcalde grants of beach and water lots in San Francisco not recorded on or before the third of April, 1850, in some book of record in the possession and under the control of the recorder of San Fran-

cisco, are void. *Chapin* v. *Bourne*, 8 Cal. 295.

23. The object of the law requiring the record of entry on lands under school land warrants, was to give notice to subsequent locators and settlers, and a failure to record it in the proper office will not make the location and entry void as to a subsequent locator with actual notice. *Watson* v. *Robey*, 9 Cal. 54.

24. This provision is like that of the act concerning conveyances, which requires the record of certain instruments. A party cannot complain that he was injured by a failure to record in the proper office, when he knew the fact without the record. *Ib.*

25. The registration of a deed upon condition precedent is sufficient to put a subsequent purchaser on inquiry as to the performance of the conditions. *Brannan* v. *Mesick*, 10 Cal. 108.

26. The purpose of a certificate of acknowledgment is to entitle the instrument to be recorded and to be admitted in evidence without further proof. *Fogarty* v. *Finlay*, 10 Cal. 245.

27. If a notary does not faithfully perform his duty, but is guilty of gross and culpable negligence in taking an acknowledgment, he is responsible to the party injured for the damages resulting from his negligence. *Ib.*

28. The true construction to be given to the registration act is, that the failure of a grantee to record his deed does not absolutely and without exception avoid the deed as to third persons. The failure to register only protects bona fide purchasers for a valuable consideration. *Hunter* v. *Watson*, 12 Cal. 374.

29. The registration act only protects purchasers; creditors, as such, are not included within its provisions. *Ib.*

30. A deed recorded January 30th, 1850, by a person acting as recorder, by virtue of an election by the people without authority of law, is not properly recorded. *Smith* v. *Brannan*, 13 Cal. 115.

31. The question as to the necessity of recording mining claims, reserved. *Partridge* v. *McKinney*, 13 Cal. 159.

32. No law authorizes a recorder or clerk of a county to record a copy of a deed in the Spanish language, so as to make it evidence without further proof. *Wilson* v. *Corbier*, 13 Cal. 167.

33. All the title which a vendor of land has at the time of his deed, passes to the vendee, as against volunteers or donees, even though the deed under which the vendor holds be unrecorded. *Snodgrass* v. *Ricketts*, 13 Cal. 362.

34. The omission in the record of a deed to make a copy of the seal, or some mark to indicate the seal, does not vitiate the record. It is sufficient, if it appear from the record that the instrument copied is under seal as for instance, where the deed purports to be under seal, and to be signed, sealed and delivered in the presence of the notary before whom it was acknowledged. *Smith* v. *Dall*, 13 Cal. 512.

35. Under the mechanic's lien act, it is not necessary that the account to be filed in the recorder's office should remain in the office after it is recorded. *Mars* v. *McKay*, 14 Cal. 128.

36. The registry act was not intended to protect judgment creditors; it was only intended to protect subsequent purchasers and mortgagees in good faith and for a valuable consideration. *Pixley* v. *Huggins*, 15 Cal. 132.

37. A subsequent purchaser of property mortgaged, with actual notice of the mortgage, cannot object to the defects in the registry thereof. *De Leon* v. *Higuera*, 15 Cal. 495.

38. A certified copy of a deed from the county recorder's office contained in the margin of the *acknowledgment* taken before a notary, and in the place where his seal is usually found, the words "no seal" thus: [No Seal]—the conclusion of the acknowledgment being, "In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year," etc. The court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the notary's seal: held, that the court erred; that the words "no seal," instead of implying that there was no seal affixed, were a mere note by the recorder of the place of the notarial seal, which he probably had no means of copying. *Jones* v. *Martin*, 16 Cal. 166.

39. A recorder, in certifying to copies of deeds from his office, need not transcribe the notarial seal to the acknowledgment—the certificate of acknowledgment in this case stating that the notary did affix his seal. *Ib.*

REHEARING.

1. The supreme court may, after a judgment, order a rehearing in a cause before the remittitur is sent down and filed in the court below; but if the remittitur be sent down after the order of rehearing is made, the court still has jurisdiction. *Grogan* v. *Ruckle*, 1 Cal. 194; *Mateer* v. *Brown*, 1 Cal. 231.

2. A party should present his whole case on the first hearing, and ought not to be permitted to argue it by piecemeal. On rehearing he will not be allowed to raise new points. *Grogan* v. *Ruckle*, 1 Cal. 197.

3. Hereafter the rule is established, that rehearings will not be granted with the same indulgence as formerly. *Andrews* v. *Mokelumne Hill Co.*, 7 Cal. 333.

4. The employment of new counsel after decision rendered is no ground for an extension of the time prescribed by the rules of the court for filing a petition for a rehearing. *Ferris* v. *Coover*, 10 Cal. 633.

5. An appeal lies from an order setting aside a final decree in equity and granting a rehearing. *Riddle* v. *Baker*, 13 Cal. 301.

6. After a judgment has been rendered by the supreme court, a material modification of such judgment should not be made upon a petition for rehearing—the rehearing should first be granted. *Clark* v. *Boyreau*, 14 Cal. 638.

See APPEAL, SUPREME COURT.

RELATION.

1. The doctrine of relation is, that "where a number of acts are to be performed in virtue of which a right accrues, the time of performance of the last act, when all have been performed in good faith," relates back to the commencement of the series of acts which create the right, so as to make it perfect when the first act was being commenced. *Barnes* v. *Stark*, 4 Cal. 413.

2. A mortgagor, after the sale of the mortgaged premises under a decree in a suit to foreclose the mortgage, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed, but he possesses no right to despoil the property in its fixtures. The deed of the sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor. *Sands* v. *Pfeiffer*, 10 Cal. 265.

3. Work done outside of a mining claim with intent to work the claim, to be considered by intendment as work done on the claim, must have direct relation and be in reasonable proximity to it. *McGarrity* v. *Byington*, 12 Cal. 432.

4. The party so in possession, under sheriff's sale, is in no better position than if he entered directly under the mortgage to enforce which the sale was made; and having received the proceeds of the property by way of sales of water, and appropriated the same to his own use, he cannot hold the property bound by the mortgage, and at the same time refuse to give the mortgagor the benefits of the amount so received. In equity he is not a purchaser, but a mortgagor; and although the sale was not set aside until after the receipt of the rents and profits, still when it was set aside, the order took effect upon the relations of the parties as they existed before the sale, the mortgagors and the mortgagee have the same rights they had before. *Raun* v. *Reynolds*, 15 Cal. 471.

RELEASE.

1. A covenant not to sue, made to a portion of joint debtors, does not release any of them. *Matthey* v. *Galley*, 4 Cal. 63.

2. A sued B & C for forcible entry and detainer, and obtained judgment against them with damages, and afterwards took a deed from B for the premises, procured D to indemnify B against the judgment, and verbally promised not to prosecute B on the judgment: held, that C was thereby released from the judgment as to the damages. *Ransom* v. *Farish*, 4 Cal. 387.

3. The second of a foreign bill of exchange, drawn here, payable at sight, was presented to the drawee, and payment being refused, it was duly protested. Afterwards, and before suit was brought, the first of exchange was paid to the holder with interest and protest fees: held, that the drawer was released from payment of damages for the dishonor of the second of exchange. *Page* v. *Warner*, 4 Cal. 396.

4. A release of the endorser of a note by the endorsee, such endorsee being a secret partner of the maker, will not release the maker. *Tomlinson* v. *Spencer*, 5 Cal. 293.

5. The entering of a discharge of a mortgage by the mortgagee does not of itself discharge the debt, but only the security. *Sherwood* v. *Dunbar*, 6 Cal. 54.

6. A release of one joint debtor is a release of the others, but it must be a technical release, under seal. *Armstrong* v. *Hayward*, 6 Cal 186.

7. A receipt given to one joint debtor on a note for a part payment, coupled with the words "which is in full on his part on the within note, and the said A B is hereby discharged from all obligations on the same," is not such a release as will discharge the others. *Ib.*

8. Neglect to sue a contractor for his breach of contract does not operate so as to release his sureties for subsequent breaches. *City of Sacramento* v. *Kirk*, 7 Cal. 420.

9. A voluntary release of the property levied on by the plaintiff in execution, could not revive the obligation on the mortgage given to secure the judgment. *People* v. *Chisholm*, 8 Cal. 30.

10. A part payment of a demand of one of two debtors will not discharge such debtor making the payment from the payment of the balance. His obligation is to pay the whole. *Griffith* v. *Grogan*, 12 Cal. 324.

11. Where the vendee of a lot of wheat released his vendor from all damages, by reason of any implied warranty of the title to the wheat, which was then in litigation between the vendee and a third party, such release made the vendor a competent witness. *Paige* v. *O'Neal*, 12 Cal. 496.

12. Nor would the nonpayment of the consideration expressed in the release affect the instrument as a valid release. The obligation to pay the consideration was created by the acceptance of the release, and is not dependent upon the contingency of a recovery in the action. *Ib.*

13. If much time intervenes between demand and notice in transfers after maturity of bills of exchange and promissory notes, the question may arise whether the delay has not released the endorser after maturity. *Thompson* v. *Williams*, 14 Cal. 163.

REMITTITUR.

1. The supreme court has jurisdiction in a cause until the remittitur is sent down and filed, and if any order is made before it is sent down, the court still has jurisdiction. *Grogan* v. *Ruckle*, 1 Cal. 194; *Mateer* v. *Brown*, 1 Cal. 231.

2. Where a case is remitted from the supreme court to a district court, the clerk of the latter may issue an execution for the costs accrued thereon without the order of the district court; the clerk of the supreme court, on entering up the judgment, adds the words "with costs," and annexes to the remittitur a copy of the bill of costs filed; these words are sufficient awarding of costs for the clerk below to issue execution thereon. *City of Marysville* v. *Buchanan*, 3 Cal. 213.

RENT.

1. Indebitatus assumpsit for rent will not lie in favor of a stranger for the purpose of trying his title, or by one of two belligerent parties claiming the land, this action depending not upon the validity of plaintiff's title, but upon a contract express or implied. *Sampson* v. *Shaeffer*, 3 Cal. 201.

2. The thirteenth section of the act concerning forcible entries and unlawful detainers was intended to make the nonpayment of rent work a forfeiture of the estate of the tenant; but the statute must be pursued strictly, and the rent must be demanded on the day it becomes due, and at a late hour of the day. *Chipman* v.

Emeric, 3 Cal. 283; *Gaskell* v. *Trainer*, 3 Cal. 339.

3. Under our code it is competent for a party to recover real property, with damages for withholding it, and the rents and profits, all in the same action, and as one cause of action. *Sullivan* v. *Davis*, 4 Cal. 292.

4. To enable a party to recover rent eo nomine, he must show that the defendant's possession is by virtue of some express or implied agreement. *Ramirez* v. *Murray*, 5 Cal. 223.

5. No action for rent will lie where the possession is adverse and tortious, for such possession excludes all idea of a contract. *Ib.*

6. A demand of rent at any time during the term when the same might be due, will be sufficient diligence to hold the party who has guaranteed its payment. *Evoy* v. *Tewksbury*, 5 Cal. 286.

7. A conveyance by a lessee of the remainder of his unexpired term, though it employs words ordinarily used in a demise, and contains a reservation of rent, and the right of reëntry upon covenants broken, is not an underletting or sublease, but is considered in law as an assignment of his whole interest, as there remains in him no reversion of the estate. *Smiley* v. *Van Winkle*, 6 Cal. 606.

8. The sale of the equity of redemption of mortgaged premises, and assignment of the rents thereof until foreclosure and sale to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured and may be enforced by foreclosure. *Dewey* v. *Latson*, 6 Cal. 616.

9. The collection of the rents and profits by the creditor purchasing can be no more a fraud upon the mortgagee than would be their application by the mortgagor to the payment of his debts. *Ib.*

10. The mortgagor having the right to sell the rents and profits, or to apply them to the payment of his debts, except as against a creditor who is hindered, delayed or defrauded thereby, the mortgagee cannot complain, as he is not such a creditor. *Ib.*

11. A purchaser of land at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor, before the expiration of the six months allowed for redemption, and as often as the rent becomes due under the terms of the lease existing when he purchased. *Reynolds* v. *Lathrop*, 7 Cal. 46.

12. Where the plaintiff had obtained judgment in another court for a quarter's rent under a lease: held, that in an action of forcible entry, for nonpayment of another quarter's rent, under the same lease, between the same parties, the plaintiff could introduce the former judgment as evidence on all the points identical in the two cases. *Love* v. *Waltz*, 7 Cal. 252.

13. Where the plaintiff leased to B. a lot for ten years, at a monthly rent payable monthly, at the end of the term B. to have two-thirds of the appraised value of the house to be by him erected, and the lease also contained this clause: "and it is further agreed," etc, "that the brick house now being erected," etc., "shall always be and remain as the same is hereby declared to be, mortgaged as security for the payment of the monthly rent herein stipulated:" held, that it was a mortgage, and that it might be foreclosed on the nonpayment of the first or any month's rent. *Barroilhet* v. *Battelle*, 7 Cal. 452.

14. And where such lessee completed the building, and subsequently mortgaged the lease to S. and afterwards assigned the lease to T. for further security, and T. entered as tenant and paid rent, there being back rents due from the original lessee: held, that T. was bound to know the terms of the lease and the mortgage therein contained; that the plaintiff had a right to foreclose, and sell the reversionary interest of the original lessee, to wit: two-thirds of the value of the house at the end of the term; that T., provided she paid the rent, would have the right of possession until the end of the term, the acceptance of rent from her having waived the forfeiture of the lease. *Ib.*

15. A judgment rendered for use and occupation should not draw any interest whatever. *Osborn* v. *Hendrickson*, 8 Cal. 33.

16. Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: held, that the purchaser under the mortgage sale can require the tenant to pay the rent over again to him. *McDevitt* v. *Sullivan*, 8 Cal. 597.

17. After sale, and before the term of redemption has expired, the purchaser is entitled to collect the rents. *Ib.*

18. Where a tenant finds that there are adverse claimants to the property, he should file a bill of interpleader, making all the adverse claimants parties thereto, and offer to pay the rents into court to abide the ultimate decision of the case. *Ib.*

19. A mortgagee of land in possession must account for rents and profits; and after payment of the debt for which the mortgage was given, he becomes, by operation of law, trustee of the surplus for the mortgagor. *Pierce* v. *Robinson*, 13 Cal. 120.

20. In an action for mesne profits, plaintiffs offered in evidence the record of an action by defendant against a third person for the use and occupation of the same premises, for a time prior to the time sued for in this action, in which defendant under oath fixed the value at a certain sum, together with evidence that the value of the use and occupation was as great in the one case as the other: held, that the evidence was admissible as a solemn admission by a party to the record in relation to a particular fact; that such admissions are not irrelevant, whether made directly or indirectly. *Shafter* v. *Richards*, 14 Cal. 126.

21. The jury found for the plaintiff in ejectment, and awarded damages for the rents and profits, and had the objection been taken to the instruction given with reference to these damages, it would have been tenable: but no such objection was taken, and the point is to be regarded as waived. *Stark* v. *Barrett*, 15 Cal. 372.

22. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance, on the first day of each month. November 1st, 1858, defendant being in possession, denied plaintiff's title, and refused to pay rent. December 23d, 1857, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent; defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers, denying, among other things, plaintiff's title and his own relation of tenant: held, that plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith* v. *Ogg Shaw*, 16 Cal. 89; 90.

23. The supreme court will not set aside the findings of the court below on conflicting proofs, especially in regard to the value of rents, or damage to property, both being of uncertain ascertainment. *Paul* v. *Silver*, 16 Cal. 75.

24. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his cotenant in possession to account for rents and profits received by him from tenants of the premises. *Goodenow* v. *Ewer*, 16 Cal. 472.

25. From rents so received, the tenant in possession may deduct the amounts paid for taxes and for necessary and proper repairs and additions for the preservation and security of the building held in common during the period for which the rents were collected. And where the building contained theater rooms, which were let from time to time with the furniture thereof—as carpets, lamps and scenery—which furniture was the individual property of the tenant in possession, he is entitled, in the accounting, to a reasonable allowance, to be deducted from the rents, for the use of such furniture, when such use was required in order to let the premises themselves. But he is not entitled to allowances for the use of any individual property in connection with the premises not thus required, nor any allowances for his personal services in taking charge of the building, renting the same, and collecting the rents. *Ib.*

See LANDLORD AND TENANT, LEASE.

REPLEVIN.

1. Where a sheriff is notified before levy that a third person owns the property, the taking is tortious, and no demand is necessary to be proven in the ac-

tion of replevin. *Ledley* v. *Hays*, 1 Cal. 161.

2. If an action of replevin be improperly commenced, the party bringing it, having obtained the benefit, cannot avoid the undertaking he has given, by pleading his own misfeasance. *Turner* v. *Billagram*, 2 Cal. 522.

3. A replevin bond was made to the sheriff instead of the party to be protected by it, by mistake, and then corrected; this did not invalidate the bond. *Turner* v. *Billagram*, 2 Cal. 522.

4. Where a replevin bond substantially conforms to the act, and no variation is pointed out, the assignees of the defendants can maintain an action upon it. *Wingate* v. *Brooks*, 3 Cal. 112.

5. In an action on a replevin bond, the fact that the defendant had commenced his action before a tribunal incompetent to try the matter in dispute is no defense; and the plea that the title to the property so replevined is in him bad. *McDermott* v. *Isbell*, 4 Cal. 114.

6. A defendant in replevin, who recovers judgment, the jury failing to find the value of the property to exceed two hundred dollars, is, nevertheless, entitled to his costs, where the plaintiff's complaint states its value at a sum exceeding that amount. *Edgar* v. *Gray*, 5 Cal. 267.

7. An officer attaching goods under civil process is entitled to notice of the claim of a third party to the goods, and a demand for them, or he is not liable in damages to such party for such seizure and detention. *Daumiel* v. *Gorham*, 6 Cal. 44; *Taylor* v. *Seymour*, 6 Cal. 514; *Killey* v. *Scannell*, 12 Cal. 75.

8. Where the defendant in a replevin suit failed to claim the return of property in his answer, and on the trial the jury found a verdict for the defendant, on which the court rendered judgment against the plaintiffs for costs, which were paid: held, that the payment of the judgment as taken was a complete discharge of plaintiff's sureties on the undertaking. *Chambers* v. *Waters*, 7 Cal. 390; *Nickerson* v. *Chatterton*, 7 Cal. 570.

9. The sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against defendant. *Nickerson* v. *Chatterton*, 7 Cal 570.

10. If the proper judgment be taken in the alternative, and the defendant fails to discharge the judgment, the sureties can only be required to pay the value of the property, and the amount of the damages and costs. *Ib.* 571.

11. Where the plaintiff, in replevin, gives the statutory undertaking, and takes possession of the property in suit, and is afterwards nonsuited, and judgment entered against him for the return of the property, and for costs: held, that his sureties are liable for damages sustained by defendant, by reason of a failure to return the goods, but not for damages for the original taking and detention, the value of the goods not having been found by the jury. *Ginaca* v. *Atwood*, 8 Cal. 448.

12. The facts upon which a trial by jury would have been found in the original replevin suit are, by a nonsuit therein, left to the jury called in the suit on an undertaking, so far as the conditions of the undertaking will authorize an inquiry into them. *Ib.*

13. The rule that when property converted has a fixed value, the measure of damages is that value with legal interest, from the time of its conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion, or at any time afterwards. *Douglass* v. *Craft*, 9 Cal. 563; *Dorsey* v. *Manlove*, 14 Cal. 555.

14. The failure of the defendant to appear on the trial of an action of replevin when the cause is called, is a waiver of a jury, under the 179th section of the code. *Waltham* v. *Carson*, 10 Cal 180.

15. In an action of replevin by W., it appeared on trial that the property sued for belonged to him and one F., a third party, and the jury returned a general verdict for the defendants, and the court gave judgment for a return of property to the defendants: held, that there was no error in the judgment. *Waldman* v. *Broder*, 10 Cal. 379.

16. The legal effect of finding for the defendants, on the question of the plaintiff's right to the property, was to entitle the defendants from whom the property was taken to its restoration. *Ib.*

17. Plaintiff brought an action of replevin against the defendants to recover certain property, and obtained a judgment for its restitution, and damages for its illegal detention; defendants paid the dam-

ages, but the property was not restored. Plaintiff then brought an action of trovor to recover the value; defendants plead the former recovery as a bar: held, that the judgment in replevin did not constitute a bar to the action of trovor, the judgment in replevin not having been satisfied. *Nickerson* v. *California Stage Co.*, 10 Cal. 521.

18. The judgment in the action of replevin was between the parties conclusive evidence of the plaintiff's title to the chattel in question, and it only remained for the court, in this action, to determine its value. *Ib.*

19. Nor is it necessary to the right of the plaintiff to recover in this action that the value of the property in the replevin suit should have been found, and an alternative judgment for the return of the property or the payment of its value. *Ib.*

20. T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff H., as sheriff. M. J., wife of J., claimed the property as sole trader, and brought her action of replevin for the property, and obtained possession of the same by the delivery of an undertaking, as required by section 102 of the code. The undertaking was executed by defendants R. and S. The replevin suit was decided February 5th, 1855, in favor of H. T. obtained judgment in the attachment suit against J., November 30th, 1854. On the 18th February, 1855, executions in favor of other creditors of J. coming into the hands of H., as sheriff, he levied them on the same property, and subsequently sold the property and paid the proceeds into court. H. then brought this suit against the sureties in the replevin bond: held, that the lien of T.'s attachment continued after the replevy of the goods of M. J. *Hunt* v. *Robinson*, 11 Cal. 277.

21. The effect of the replevin bond is simply to give the party the possession of the property, pending the litigation. The title is not changed. *Ib.*

22. The primary object of the replevin suit is the recovery of the thing itself. The value is received only in the alternative that the property is not returned. *Ib.*

23. In an action on replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. *Ib.*

24. Where the property seized by a sheriff is in the possession of a stranger to the execution, it is not sufficient as a justification of the seizure to prove the execution only; the judgment upon which it was issued should also be proved. *Paige* v. *O'Neal*, 12 Cal. 495.

25. In an action to recover personal property, to enable the defendant to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer, relative to the change of possession from defendant to plaintiff. The judgment of return or value is in the nature of a cross judgment, and must be based upon proper averments. *Gould* v. *Scannell*, 13 Cal. 431.

26. A safe in the possession of McC., belonging to W., F. & Co., for whom, as also for plaintiff, he was agent, contained six thousand dollars in coin. Of this sum four hundred dollars belonged to W., F. & Co., the balance to plaintiff. Defendant, as sheriff, under a writ against McC., seized eighteen hundred dollars of the money in his safe as his property, and put it in a bag. Plaintiff then claimed the money as his, McC. being present and not objecting: held, that this amounted to a segregation of the eighteen hundred dollars from the mass of coin in the safe, so as to sustain replevin by plaintiff. *Griffith* v. *Bogardus*, 14 Cal. 412.

27. In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the ad damnum of the writ. The value of the property is only one predicate of the recovery. *Coghill* v. *Boring*, 15 Cal. 218.

28. Where goods are seized by the sheriff on an execution against G., and the owners of the goods so in the sheriff's hands assign them to plaintiff, who replevies them on the ground of fraud in the original sales, the assignors are competent witnesses for plaintiff. This is not assigning a chose in action, but a sale of specific goods. *Ib.*

29. Plaintiff sued out an attachment against K., and the sheriff levied it on certain goods. Other creditors issued attachments, which were levied by the sheriff on the same goods. Plaintiff then dis-

missed his attachment and sued the sheriff in replevin, claiming that K. obtained a portion of the goods of plaintiff, by fraud. Instead of taking the goods out of the sheriff's possession, plaintiff made an arrangement with the sheriff, whereby he agreed to sell the goods, and keep the proceeds to answer any judgment plaintiff might obtain in his replevin suit. Sheriff sold the goods, paid the money into court, saying nothing about this arrangement, and the money was paid by order of the court on the claims of the other creditors. The sureties of the sheriff had nothing to do with, and gave no sanction to the arrangement. Plaintiff had judgment in replevin: held, that the sureties on the sheriff's official bond are not liable to plaintiff for the goods or the money received from the sale—this arrangement between him and plaintiff being no part of the sheriff's official duty; that the sheriff, as such, had no legal authority to sell these goods and to hold the money on bailment for plaintiff; and that, in so far as plaintiff trusted the sheriff with the goods, and authorized him to sell them, he became the agent of plaintiff, and must be looked to as such. *Schloss* v. *White*, 16 Cal. 68.

30. A complaint in replevin, alleging that F. was seized and possessed of certain premises at the time of his death; that the plaintiffs were appointed the executors of his last will and testament, and ever since their appointment have been in the possession of the premises; that certain persons, whose names are not designated, entered upon the same without authority, and cut down timber growing thereon, to the amount of about three hundred cords; that the defendant afterwards also entered upon the premises, without authority, and removed the wood thus cut, and still detains it from the plaintiffs; that they have demanded the possession of the same from him, and that he refuses to deliver it to them, to their damage of $1,100—the alleged value of the wood—sufficiently shows plaintiffs' ownership of the wood. *Halleck* v. *Mixer*, 16 Cal. 578.

31. The averments, in such complaint, of "unlawful and wrongful," as applied to the entry upon the premises and the cutting down of the timber, and to his removal and detention of the same, may be stricken out as surplusage. *Ib.*

32. Against the cutting of timber the owner of real property is entitled to the preventive remedy of injunction. Whilst the timber is growing, it is part of the realty, and its destruction constitutes that kind of waste the commission of which a court of equity will, upon petition, restrain, When once cut, the character of the property is changed; it has ceased to be a part of the realty and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it in whosesoever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot find the property to enforce its specific return, he may waive the wrong in its removal and use, and sue for the value as upon an implied contract of sale. *Ib.*

33. In suits for damages for timber cut and removed, as in this case, the true rule, so far as the title to the land is concerned, is this: The plaintiff out of possession cannot sue for the property severed from the freehold, when the defendant was in possession of the premises from which the property was severed—holding them adversely, in good faith, under claim and color of title—in other words, the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants. *Ib.* 579.

34. But this rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is upon such proof that the right of recovery rests. It is because the plaintiff owns the premises, or has the right to their possession, that he is entitled to the chattel which is severed, and that must be in the first instance established. A mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action. *Ib.*

35. The complaint here, averring that plaintiffs were duly appointed executors of the last will and testament of the deceased, and have ever since been such executors, and as such have been ever since in the possession of the premises, is not demurrable on the specific ground that it does not show that plaintiffs are the executors of F., or have any authority to maintain the action—though it is subject to other ob-

jections. The complaint should state the death of F.; his leaving a last will and testament; the appointment therein of the plaintiffs as executors; the probate of the will; the issuance of letters testamentary thereon to the plaintiffs; and their qualification and entry upon the discharge of their duties as executors. *Ib.*

RES GESTÆ.

1. The declarations of an agent or servant are admissible in evidence against the principal, only when they form a part of the res gestæ; and the declarations of a bar keeper to a third person as to the contents of a package left by a guest in the charge of an inn keeper, when not made in any way in the discharge of his duty as bar keeper, are not admissible in an action against an inn keeper to prove the contents of the package. *Mateer* v. *Brown*, 1 Cal. 224; see *Gerke* v. *California Steam Navigation Co.*, 9 Cal. 256.

2. The declarations of an agent, when but the bare narration of an act which had already taken place and was fully ended, do not form a part of the res gestæ and are inadmissible in evidence against his principal. *Innis* v. *Steamer Senator*, 1 Cal. 461.

3. The declarations of a vendor of personal property after the sale, are not good to impeach the title of the vendee, and if offered as a part of the res gestæ, clear and unequivocal possession by the vendor must be shown. *Visher* v. *Webster*, 13 Cal. 61.

4. Defendant killed deceased while he was in the act of injuring a mining claim. On the trial, defendant offered to show that he was the owner and in the lawful possession of such claim at the time of the killing. The court refused testimony on this point: held, that defendant has a right to prove his ownership of the claim, for the purpose of showing his mental condition; the motive which prompted his action, and determining the character of the offense; that the ownership was part of the res gestæ and should have been admitted, subject to instructions from the court as to its legal effect, though when admitted it may not have amounted to a justification. *People* v. *Costello*, 15 Cal. 355.

5. The declaration of deceased made at the time of procuring the weapon was admissible as part of the res gestæ and illustrative of the transaction; that it showed the purpose for which the weapon was procured, and that this purpose was an item of proof upon the question which of the two parties first assaulted, this being the point to which the testimony was offered. *People* v. *Arnold*, 15 Cal. 481.

See AGENCY, EVIDENCE.

RESIGNATION.

1. The legislature having elected a State printer, who resigned, and a State printer was during the session of the legislature appointed by the governor, and he resigned after the adjournment and during the recess, whereupon the governor appointed another person to fill the vacancy supposed to exist: held, that this second appointment as well as the first one, was irregular and void. *People* v. *Fitch*, 1 Cal. 536.

2. Elections to fill vacancies occasioned by the death or resignation of an officer are special elections; and the proclamation of the governor, required by statute, is necessary to the validity of a special election. *People* v. *Porter*, 6 Cal. 28; *People* v. *Weller*, 11 Cal. 65; *People* v. *Martin*, 12 Cal. 410; *People* v. *Rosborough*, 14 Cal. 187.

3. An election which was ordered by the board of supervisors, to fill a vacancy in the office of county judge occasioned by the resignation of the incumbent, without proclamation of the governor, is invalid; and the office being vacant, can be properly filled by the appointment of the governor. *People* v. *Porter*, 6 Cal. 68; *People* v *Martin*, 12 Cal. 411.

See ELECTION, OFFICE.

RETURN.

1. A sheriff's return is not traversable, and a court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and collusion. *Egery* v. *Buchanan*, 5 Cal. 56.

2. A sheriff failing to pay over money collected on execution, should be prosecuted for a false return. *Ib.*

3. The return of an attachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the correction. *Newhall* v. *Provost*, 6 Cal. 87; *Webster* v. *Haworth*, 8 Cal. 25.

4. The presumptions are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached is sufficient prima facie to show a due and proper execution of the writ. *Ritter* v. *Scannell*, 11 Cal. 248.

5. The title of a purchaser of real estate on execution at sheriff's sale does not depend upon the return of the officer of the writ. *Cloud* v. *El Dorado County*, 12 Cal. 133.

6. A sheriff, under his general powers, cannot take anything but legal currency in satisfaction of an execution, and where he takes a note, endorses it on the execution, and then returns it satisfied, the return is not conclusive, and perhaps not prima facie evidence of satisfaction, unless it shows some authority for receiving the note. *Mitchell* v. *Hackett*, 14 Cal. 666.

See ATTACHMENT, EXECUTION, SUMMONS.

REVENUE.

1. The common council of Sacramento, by resolution, made an appropriation to the mayor of the city of $10,000, reciting meritorious serviees (but such as were within the line of his official duty) as the consideration, which was exclusive of his salary, which was regularly paid. The mayor died the day the appropriation was passed, and did not accept it formally: held, that the appropriation could not be recovered in an action at law. *Heslep* v. *City of Sacramento*, 2 Cal. 581.

2. The revenue act of May, 1853, does not violate that provision of the State constitution, which provides that all laws of a general nature shall be uniform in their operation. By a uniform operation, it was intended that laws of this character should as near as possible affect persons and property alike. A perfectly equal tax law is impossible from the very nature of the subject. *People* v. *Coleman*, 4 Cal. 55.

3. The act of May 1st, 1854, which creates the office of State printer, and requires the controller to draw his warrants on the treasury for such sums as may be due the State printer, is not a specific appropriation. *Redding* v. *Bell*, 4 Cal. 333.

4. The revenue act provided that the board of supervisors or courts of sessions shall levy, in addition to a State tax, a tax, not to exceed fifty cents on each one hundred dollars, for county purposes, and such other special taxes as may be by law authorized to be collected. Under this provision, the courts of sessions of Sacramento levied a tax of fifty cents for county purposes, twenty-five cents for funded tax, &c.: held, that the words of the revenue act, authorizing a tax of fifty cents on each one hundred dollars for county purposes, ought not to be restricted to the current expenses of the year as an appropriation, leaving the scrip holders of the county to look for payment to the tax collected for the floating debt. *McDonald* v. *Griswold*, 4 Cal. 352.

5. In the absence of an unexhausted specific appropriation to meet a warrant of the controller on the State treasurer, a warrant on the treasurer is absolutely void. *Butler* v. *Bates*, 7 Cal. 137.

6. The revenue law of 1854 authorized the payment of a portion of the taxes in controller's warrants. The acts of 1855 and 1856 provide for the funding of the State debt and the collection of the revenue in cash, and forbid the treasurer to liquidate any of the debt except as therein provided: held, that the act of 1854, allowing payment in warrants, was thereby repealed. *Scofield* v. *White*, 7 Cal. 401.

7. The act authorizing the county recorder of Yuba county to be paid out of the county treasury for certain specified services, contains no words which raise the presumption that he was to be allowed a preference over other creditors. *People* v. *Williams*, 8 Cal. 100.

8. Though the legislature can make such disposition of accruing revenue as it deems proper, a construction of a statute which would impair the rights of third parties will always be unwillingly adopted, in the absence of express words to that effect. *Ib.* 101.

9. The revenue act of 1854 made the sheriff ex officio tax collector, and provided that he should be liable on his bond for the discharge of his duties in the collection of taxes. No other bond is required by law of the sheriff except when he acts as collector of foreign miners' licenses: held, that the bond in suit, entered into in 1856, must be deemed to have been executed in view of the provisions of the revenue act, and that all delinquencies in the collection of taxes, except foreign miners' licenses, are covered by the bond. *People* v. *Edwards*, 9 Cal. 292.

10. The power of appropriation which the legislature can exercise over the revenues of the State, for any purpose which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city or town for any purpose connected with their past or present condition, except as such revenues may, by the law creating them, be devoted to special purposes. *People* v. *Burr*, 13 Cal. 351.

11. To an appropriation within the meaning of the constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity, that funds to meet the same should be at the time in the treasury. *People* v. *Brooks*, 16 Cal. 28.

12. The provision in the constitution, that "no money shall be drawn from the treasury, but in consequence of appropriations made by law," means only that no money shall be drawn, except in pursuance of law. *Ib.*

13. The act of April 13th, 1854, amendatory of the act concerning the office of controller, and providing that no warrants shall be drawn, except there be "an unexhausted specific appropriation" to meet the same, means only that the controller shall not draw a warrant for a specific object, when he has already drawn for the full amount of the appropriation made for that object; and this act does not qualify the right of Estill, or those representing him, to warrants for the monthly installments, as they respectively become due, under the contract between him and the State, relative to the State prison and its convicts. *Ib.*

See TAXATION.

REVERSAL.

See APPEAL, JUDGMENT.

REWARD.

1. A municipality appropriated, by resolution, the sum of $10,000 to their mayor, for meritorious services in quelling a riot, exclusive of his salary which was paid. The mayor died from wounds received in the riot before he formally accepted the appropriation: held, that the same could not be recovered by his executor at law. *Heslep* v. *City of Sacramento*, 2 Cal. 480.

2. An agreement by one who has lost property by fire or theft, to pay a certain sum to any one who will secure the arrest and conviction of the criminal, is not a nude pact; but may be enforced by a person performing the service. *Ryer* v. *Stockwell*, 14 Cal. 136.

3. In such cases, the offer of a reward or compensation by public advertisement, either to a particular person or class of persons, or to any and all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal binding contract. Until performance, the offer may be revoked at pleasure. *Ib.* 137.

4. When the reward was for such information as would lead to the arrest and conviction of the criminal, there could be no claim for the money until trial and conviction. The statute of limitation begins to run from that time, and the limitation would be four years, as on a written contract. *Ib.*

RIVERS.

See WATERCOURSES.

ROADS.

See STREETS AND HIGHWAYS.

SACRAMENTO.

1. The common council of the city of Sacramento, by resolution, made an appropriation to the mayor of the city of $10,000, reciting meritorious services (but such as were within the line of his official duty) as the consideration, which was exclusive of his salary which had been regularly paid. The mayor died the same day the resolution was passed, and did not formally accept the appropriation: held, that the appropriation could not have been recovered by action at law. *Heslep* v. *City of Sacramento*, 2 Cal 281.

2. The recorder of the city of Sacramento has no jurisdiction in cases of forcible entry and unlawful detainer. *Cronise* v. *Carghill*, 4 Cal. 122.

3. The city of Sacramento declared to be the capital of the State. *People* v. *Bigler*, 5 Cal. 24.

4. Fines properly imposed in the court of a mayor or recorder of a city, or before any municipal officer of a corporation, must be paid into the treasury of the city or other corporation. There is no statute which alters the rule as to the city of Sacramento. *People* v. *City of Sacramento*, 6 Cal. 425.

5. It was not the intention of the legislature by the passage of the act of April 24th, 1858, repealing certain acts "and to incorporate the city and county of Sacramento," to repeal the law by which the county of Sacramento was created. *People* v. *Mullins*, 10 Cal. 21.

6. An indictment found by the grand jury of the county of Sacramento, on the sixth day of May, 1858, is good, as such jury was properly empanneled as of the county of Sacramento. *Ib.*

7. The title of the government to the lands of Sacramento city passed to Sutter by his grant; an estate vested in him, subject it is true, to be defeated by the action of the Mexican government, by direct rejection, or in case of noncompliance with its conditions, by proceeding to that end. Neither of these proceedings was had under the Mexican government, and therefore at the date of the cession of California to the United States, his title remained in full force. *Ferris* v. *Coover*, 10 Cal. 618.

8. Where the charter of the city of Sacramento authorized the common council to levy a special assessment for grading and improving the streets of the city, and provided that when the council thought it expedient to open, alter or improve any street, they should give notice, etc., and if one-third of all the owners in value of the adjacent property protest against the proposed improvement, within ten days after the last publication, it shall not be made, and a protest was presented more than ten days after the last publication of such notice: held, that such protest was not presented in time, and was therefore ineffectual; further held, that it must appear that one-third of the owners in value of the adjacent property united on it. *Burnett* v. *City of Sacramento*, 12 Cal. 82.

9. A stage company, engaged in carrying passengers to and from Sacramento city, is liable to pay to the city a license tax, under the provisions of section 22 of "an ordinance authorizing and regulating the issue of licenses and the collection of a license tax. *City of Sacramento* v. *California Stage Co.*, 12 Cal. 138.

10. Prior to the consolidation act, the recorder of the city of Sacramento was entitled to collect the same fees as justice of the peace for services in criminal cases: but he was bound to pay them over to the city treasurer. *Curtis* v. *Sacramento County*, 13 Cal. 292.

11. An ordinance was passed by the board of supervisors of the city and county of Sacramento, June, 1858, relative to the

cemetery, in which it was provided that the board should appoint a person to superintend the cemetery "annually in October, who shall hold office for the term of one year," and further, that the board, at their first meeting after the passage of the ordinance, should appoint a superintendent to hold office "until October next, and until his successor is appointed and qualified." Defendant was so appointed July 8th, 1858, and held the office until December, 1859, the board having failed to appoint his successor before that time, when relator was appointed: held, that relator is entitled to the office; that the failure to appoint in October, 1858 and 1859, did not exhaust the power of the electoral body—the time named being directory, and not of the essence of the power. *People* v. *Murray*, 15 Cal. 222.

12. In ejectment for land within Sutter's fort, in the city of Sacramento, if the petition of Sutter soliciting eleven leagues in the establishment "named New Helvetia," and the grant in which is conceded the land referred to in the petition named "New Helvetia," be in evidence, together with the declarations of Vioget in connection with the accompanying map, fixing the southern boundary of the grant some miles below the American river, and also, together with the proof, that the territory lying between the American river and Sutterville, the western line of Leidesdorff's grant and the Sacramento river, embracing Sutter's fort and the enclosures and settlements around it, was known and recognized by every one throughout the country as New Helvetia; that Sutter had entire and undisputed possession of the same; that no one questioned his right till 1850, and that the premises in dispute were within his enclosures at the fort; the evidence would be prima facie, if not conclusive evidence that the premises were covered by the grant. *Morton* v. *Folger*, 15 Cal. 283.

13. Under the consolidation act of 1858, the treasurer of the city and county of Sacramento is entitled to receive for his official services only $3,000 per annum. He is not entitled to the percentage allowed by the State to county treasurers for money paid by them into the State treasury. This percentage belongs to the city and county of Sacramento. *City of Sacramento* v. *Bird*, 15 Cal. 295.

14. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento have the power to levy a license tax upon the business of a merchant, and to collect such tax by ordinary suit. *City of Sacramento* v. *Crocker*, 16 Cal. 122.

15. An ordinance graduating the amount of such tax according to the amount of the monthly sales of the merchant is not unconstitutional because the tax is unequal. The tax is not on the goods, but on the business, and the provision for determining the amount of the tax is uniform and equal, applying to all persons in the same category. *Ib.*

16. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento have no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act, and their action, in creating such office and raising such salaries, may be reviewed on *certiorari*. *Robinson* v. *Supervisors of Sacramento County*, 16 Cal. 211.

17. That act is an enabling statute, creating a board with special powers and jurisdiction, and the board has only the power conferred by the act. *Ib.*

18. In ejectment for land in Sacramento county, claimed under Sutter's grant, the grant by Micheltorena to Leidesdorff in October, 1841, is competent evidence to show that the tract of country now embraced by that county is included within the boundaries of the grant to Sutter. *Cornwall* v. *Sutter*, 16 Cal. 429.

19. For land within the boundaries of the general tract granted to Sutter, in the county of Sacramento, ejectment will lie directly upon the grant, although no official survey and measurement have yet been made by the officers of government, and although it may appear, when such survey and measurement are made, that there exists, within the exterior limits of the general tract, a quantity exceeding the eleven leagues. *Ib.*

20. Until such official measurement, no individual can complain, nor be permitted to determine, in advance, that any particular locality will fall within any surplus over and above the specified quantity, and thereby justify its forcible seizure and detention by himself. *Ib.*

21. The evidence in this case, showing

that the land within Sacramento county was in possession of Sutter, by permission of the former government, for years previous to the cession to the United States; that it was subjected by him to such uses as he desired; that he had absolute control over it, without disturbance by any one, exercising the rights of a proprietor, to the knowledge of the government, and with its recognition of their existence; that he asserted ownership of the land, under the grant from Alvarado, and that for years after the conquest and treaty his claim and possession was unquestioned; his title, whether it be regarded as a legal or equitable one, is sufficient, under these circumstances, to enable him, and those holding under him, to recover or maintain possession in the courts of the State, at least, until the United States intervene, and determine, through the appropriate departments, that his claim, under his grant, shall be satisfied by land elsewhere selected. *Ib.*

22. The words in the petition of Sutter —"not including, in said eleven leagues, the land which is periodically inundated with water in winter," and the words in the grant, "without including the lands inundated by the impulse and currents of the rivers"—mean the land which is regularly inundated during the winter, and refer only to what are known as *tule lands*. No other lands will meet the terms of the petition. *Ib.* 430.

SALARY.

See COMPENSATION, V., WAGES.

SALE.

I. IN GENERAL.

1. There is no such thing as market overt in sales known to our laws. *Rogers* v. *Huie*, 1 Cal. 436.

2. A consignment of goods was made to defendants as partners: after the dissolution of the partnership, two sales of a portion of the merchandise were made, one by each partner, who severally received the money: held, that the partnership continued for the purpose of fulfilling the engagements, and that the defendants were jointly liable. *Johnson* v. *Kellogg*, 3 Cal. 346.

3. It is error to admit evidence of the value of goods, in an action against a factor to compel him to account, where no charge of fraud, nonperformance or negligence is made. The strict measure of damages in such case is the net proceeds of sale. *Lubert* v. *Chauviteau*, 3 Cal. 463.

4. A complaint is insufficient, which alleges an indebtedness and sets forth an account, but does not allege the sale or delivery of the articles to the defendant, nor show in what place or in what manner the indebtedness accrued, whether on account of the defendant or that of another. *Mershon* v. *Randall*, 4 Cal. 326.

5. Where a party makes a purchase from an innocent agent, who afterwards parts with the money of his principal, and it afterwards turns out that such purchase avails the purchaser nothing: held, that no right of legal complaint will lie against the agent. *Engels* v. *Heatley*, 5 Cal. 136.

6. C. sold a lot of lumber to B., and A., who claimed it, notified B. that the lumber belonged to him and brought an action to recover the price: held, that the notice and form of action recognized the right of C. to sell the lumber. *Argenti* v. *Brannan*, 5 Cal. 353.

7. A sale of property, however fraudulent as to creditors, is good as between the parties to the sale. *Montgomery* v. *Hunt*, 5 Cal. 368.

8. The purchase of property by a factor in his own name makes him to all the world the apparent owner, and as far as affects the rights of third parties, his power is unlimited. He has the right to sell or pledge. *Leet* v. *Wadsworth*, 5 Cal. 405.

9. A warranty will not be implied, ex-

cept in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of a sale by sample, or of provisions for domestic use. *Moore* v. *McKinlay*, 5 Cal. 473.

10. There is no warranty in the following words of a sale note: "We have this day sold you the shipment of seeds for arrival." *Ib.*

11. The right of the enjoyment of possession to public lands may descend among the effects of a deceased person to the executor or the administrator, and the right of the deceased be conveyed by a regular sale to another. *Grover* v. *Hawley*, 5 Cal. 486.

12. R. being in insolvent and embarassed circumstances, sold certain property to the plaintiff, in order to discharge certain debts which were liens upon his homestead, for the purpose of saving it for himself, of all which the plaintiff was aware at the time he made the purchase: held, that the sale being with the direct intent of benefit or advantage to the seller, and to the injury of the creditors, is fraudulent and void as to such creditors. *Riddell* v. *Shirley*, 5 Cal. 489.

13. A sale under such circumstances, except to a creditor in payment of his debt alone, and free from knowledge of or collusion with the object of the debtor, must be considered a fraud in fact and in law. *Ib.* 490.

14. A sale of personal property, unaccompanied by immediate delivery, is void as to creditors, and this, though delivery be made before levy is made by the creditors. *Chenery* v. *Palmer*, 6 Cal. 122.

15. Where the court below, sitting as a jury, found that a sale was not made in good faith, and was without consideration, but failed to find as a fact a fraudulent intent, and entered judgment accordingly in favor of a subsequent purchaser: held, to be error. *Gillan* v. *Metcalf*, 7 Cal. 139.

16. A bill of sale not under seal* is insufficient to convey a mining claim. *McCarron* v. *O'Connell*, 7 Cal. 153; *Clark* v. *McElvy*, 11 Cal. 160.

17. Contracts for the sale of land were, under the Mexican law, and by the custom of California, required to be in writing, and although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain the names of the parties, the things sold, the date of the transfer, and the price paid. *Hayes* v. *Bona*, 7 Cal. 159; *Stafford* v. *Lick*, 10 Cal. 17.

18. If the purchasers from parties said to have been insolvent bought in good faith, it is immaterial how many prior liens may have attached on the property; they are entitled to what remains after the liens are satisfied, or they would have the right to pay the liens and keep the property; and a court of equity would not interfere in such a case. *Kinder* v. *Macy*, 7 Cal. 207.

19. Where the plaintiff sold a number of bales of drillings to A. for the purpose of making sacks, deliverable to A. as fast as he needed them for manufacturing, and A. agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking the sacks as he should make his payments: held, that upon the delivery of the drills to A., the title vested in him complete. *Hewlett* v. *Flint*, 7 Cal. 265.

20. Where the plaintiff bought eight hundred sacks of flour on storage in a warehouse, which stood therein as a separate pile, the number of sacks of which was ascertained by counting the outside rows, and the number in the pile marked on one of the sacks, and it was thus delivered to the purchaser, who permitted it to remain in the same place, where it was several days afterwards attached as the property of the vendor: held, that the delivery was sufficient, and the sale valid. *Cartwright* v. *Phœnix*, 7 Cal. 282.

21. Testimony showing a fraudulent design in a vendor of goods is admissible under the allegations of an answer charging that the sale was made to defraud creditors, although it does not connect the purchaser with the fraud, or show that he was cognizant of such a fraudulent design. *Landecker* v. *Houghtaling*, 7 Cal. 392.

22. Such testimony would not of itself vitiate the sale to an innocent purchaser, without notice and for a valuable consideration; but the fraudulent intent of the vendor being established, the jury must determine from the circumstances of the case whether the purchaser participated in the fraud. *Ib.*

23. Every sale of property and personal chattels is good, as between the par-

*The statute of 1860, p. 175, permits bills of sale of mining claims without seal to pass the title.

ties, and cannot be attacked as fraud, except by a creditor who has obtained judgment and taken out an execution which has been returned unsatisfied in whole or in part. *Thornburgh* v. *Hand*, 7 Cal. 565.

24. It makes no difference whether the misrepresentations were made willfully or ignorantly, or that the action against the purchaser was brought in the name of the sheriff. *Webster* v. *Haworth*, 8 Cal. 26.

25. To estop a party from claiming goods as against the creditor of a third party, it must appear that he stated to the creditor himself that he had sold the article to the third party, and that the creditor parted with some right or advantage on the faith of the information. *Goodale* v. *Scannell*, 8 Cal. 29.

26. Parol evidence is inadmissible to show that a bill of sale included property not described therein. Where a bill of sale is defective in such particular it can only be altered by a direct proceeding in chancery for the purpose of reforming it. *Osborn* v. *Hendrickson*, 8 Cal. 32.

27. A sale of merchandise by bill of sale, the goods remaining in the possession of the vendors as warehousemen at a regular charge and their receipt given for the goods on storage, the vendors doing business as commission merchants and sometimes receiving goods on storage, is void as to the creditors of the vendors. *Stewart* v. *Scannell*, 8 Cal. 83.

28. The declarations and acts of a vendor before a sale are competent testimony to show a fraudulent intent on his part, in a suit to impeach the sale on the ground of fraud. *Vischer* v. *Webster*, 8 Cal. 113; *Howe* v. *Scannell*, 8 Cal. 327.

29. Where a person clearly insolvent purchases goods from another on credit and conceals the fact of his insolvency from the vendor, he is guilty of such fraud as vitiates the sale. *Seligman* v. *Kalkman*, 8 Cal. 214.

30. As a general rule, the vendor of goods is not a competent witness to impeach the sale made by himself. *Howe* v. *Scannell*, 8 Cal. 327.

31. A sale of personal property to be valid against creditors must be accompanied by an actual and continued change of possession. *Whitney* v. *Stark*, 8 Cal. 517.

32. Where the purchasers from a common vendor are equally innocent or equally at fault, the first purchaser is entitled to the goods. *Vance* v. *Boynton*, 8 Cal. 560.

33. Where a sale of personal property is void as to subsequent purchasers, must be determined under the fifteenth section of the statute of frauds. *Ib.* 561.

34. Where H., the owner of barley which he has piled up in his corral, sells five hundred sacks thereof to V., who has it separated, marked "V" and piled up in another part of the corral and employs a third person to take care of the same for him, and H. afterwards sells and delivers the same to B.: held, that B. was entitled to the property, the sale from H. to V. not being followed by an actual and continued change of possession. *Ib.*

35. Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on the warehouseman which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on his books charging the vendor and crediting the purchasers with their respective lots: held, that there was a sufficient delivery of possession without a separation of the various lots. *Horr* v. *Barker*, 8 Cal. 608.

36. Where M. made a bill of sale to G. of forty-two barrels of vinegar then in possession of G. as keeper for the sheriff, as collateral security for a debt due G., and G. subsequently gave back the bill of sale to M. without any liquidation of the debt or change of the possession of the property, and the property was afterwards sold by the defendant as sheriff, M. bringing an action of trover against the defendant to recover the same: held, that M. had no title to the property upon which he could recover in such an action, as the mere act of handing back the bill of sale to M. did not revert the title in him. *Middlesworth* v. *Sedgwick*, 10 Cal. 393.

37. F. sold to V. P. certain goods, the possession of which V. P. retained for two or three days, when he leased the premises in which the goods were and delivered the goods to F., his vendor, and one M., who, after carrying on the business in connection with F. for a few days, retired, leaving F. in the exclusive possession of the property, which possession continued until the goods were seized by L. as con-

stable, under an execution against F: held, that the sale of the goods to V. P. was void as to creditors and the goods were subject to the execution against F. *Van Pelt* v. *Littler*, 10 Cal. 394.

38. In the fall of 1856, L. rented of W. a portion of his brick yard for the purpose of making bricks; L. subsequently made a kiln of bricks and left them in W.'s charge and possession for him to sell for L.'s benefit. In January, 1857, L. made and delivered a bill of sale of the bricks to R. and informed W. of the same, but there was no change of possession under the bill of sale. J., the defendant, as constable, seized the bricks under a process against L. and sold them as the property of L: held, that L.'s sale to R. was a fraud as against the creditors of L., and that defendant was justifiable in taking the bricks and selling the same. *Richards* v. *Schroeder*, 10 Cal. 431.

39. H. and S. were the owners of a mule team, which they used in hauling quartz rock to their quartz mill; the team was driven by one L., an employee. K. and S. sold the team to H., executing a bill of sale and delivering the team by the discharge of L., the driver, who was immediately employed by H., and saying to H. "there is the team." K. and S. then hired of H. the team at eight dollars per day, and put it in the same business of hauling quartz rock as before, and with L. the same driver; team was kept and fed at K. and S.'s stable as before the sale: held, that there was no such actual and continued change in the possession of the property, under H.'s purchase, as to take the case out of the operation of the statute of frauds. *Hurlburd* v. *Bogardus*, 10 Cal. 519.

40. A bill of sale for a mining claim, not under seal and without warranty, which only purports to convey to the vendee the right, title and interest of the vendor, will not pass the title, although the vendor is in possession at the time, if such possession is without title. Such a bill only passes an equity, which is subject to the legal title or any superior equity. *Clark* v. *McElvy*, 11 Cal. 160.

41. The mere passive acquiescence of the other partners or tenants in common in a sale of the interest of the plaintiff by a party having no title, cannot confer any upon the vendee. *Waring* v. *Crow*, 11 Cal. 372.

42. Where the defendant, intending to deceive the plaintiff, got from him a bill of sale for goods, under the representation that it was only to serve as a temporary security for the compliance by the plaintiff to furnish certain securities on previous indebtedness, and at this time intended to refuse to receive such security or give plaintiff the advantage of such new contract, the possession of such goods thus obtained was fraudulent and the bill of sale void. *Butler* v. *Collins*, 12 Cal. 461.

43. If A sells his property to B in consideration of so much money, to be paid by B to C, though the money is to be paid by or out of a sale of the goods, the contract is not void. There is no difference in such a case between paying to A and paying to A's order or creditor. *Wellington* v. *Sedgwick*, 12 Cal. 474.

44. Where a sheriff having an execution against S. and M., levied it upon certain goods, the property of S. and M., and placed them in the hands of W. as keeper, and subsequently the execution was quashed, and betwen that time and the issue and levy of a new execution W., who still remained in possession of the goods, purchased the goods of S. and M.: held, that such purchase is valid, and vested the property in W. *Ib.* 475.

45. A sale of personal property without delivery is not absolutely void, but only so as to creditors and subsequent purchasers. *Vischer* v. *Webster*, 13 Cal. 61.

46. Plaintiff had two stacks of hay, and contracted to sell to defendant one stack, together with enough off the other stack to make sixty tons. The price was to be eighteen dollars per ton; and the hay was to be baled by plaintiff, and piled up in a corral, and then he was to be paid. Plaintiff had sixty-two tons and four hundred and thirty pounds of hay baled, and piled up in the corral, the surplus over sixty tons being by mistake of the man employed to bale. The bales were of different weights. Plaintiff then went to the house of defendant, and told him that the hay was baled and piled in the corral, and that there were two tons and some hundreds of pounds over the sixty bales piled up together, and asked defendant whether he would take the surplus. Defendant said he would be over soon and see about taking the surplus. Defendant then paid plaintiff two hundred dollars. Plaintiff

sues for nine hundred and nineteen dollars balance due on the hay. The court instructed the jury that if they believed from the evidence it was the understanding of the parties, that upon the payment of the two hundred dollars by defendant the right and possession was deemed to have accrued to defendant to take the quantity bought as baled and stacked up in the corral, the plaintiff is entitled to recover, even though the bargain was not concluded as to the excess: held, that the instruction was right; that the question was, whether there had been a delivery, and any agreement of the parties upon the subject was legitimate matter for the jury; that the fact that the hay purchased by defendant was mixed with other hay belonging to plaintiff made no difference, if defendant agreed to accept it in that condition, and to consider it as delivered—the contract for delivery would be fully executed. *Smith* v. *Friend*, 15 Cal. 126.

47. On the above facts, defendant asked the court to instruct the jury that "if plaintiff sold to defendant sixty tons out of sixty-two tons and four hundred and thirty pounds of hay, the same being in bales of different and unequal weights, and containing different quantities, and all being in the same pile, there was no delivery without division had." The instruction was refused: held, that the refusal was not error, because the instruction assumed that there could not have been a delivery, whatever may have been the understanding of the parties, until the exact quantity contracted for was segregated and set apart for the defendant. *Ib.*

48. A bill of sale of "all the goods and merchandise and property we own, have or had an interest in, in a store in Nevada, county of Nevada, formerly occupied by Bailey Gatzert, and now in the possession of the sheriff of Nevada county. Said goods were forwarded by us to Bailey Gatzert, Nevada," contains a sufficient description of the goods. *Coghill* v. *Boring*, 15 Cal. 218.

49. To enable a vendor of goods to rescind the sale he must offer to return the notes given for the goods; but this offer can be made at or any time before the trial. *Ib.*

50. Plaintiff sues for damages in levying on fruit trees shipped by him to W., and landed to W.'s order on the wharf at Stockton, claiming that the trees were not paid for, and not subject to W.'s debts for want of delivery, and asked, on the trial, this instruction: "That a man who is insolvent for the want of means to pay his debts in this State is in law insolvent, without reference to any property in another State:" held, that the proposition is too broadly asserted, even if there were any proof on which it could rest—but in this case there is no proof of the insolvency of W. *Thompson* v. *Paige*, 16 Cal. 79.

51. Plaintiff also asked this instruction: "That a delivery at the wharf is not sufficient, unless notice be previously given to the vendee of their arrival, and that sufficient time be allowed to enable him to receive and remove them:" held, that this proposition is not strictly correct; that if the trees bargained for were put on the wharf, marked for W., with the intention of his taking them, and if this were done by his order, they would vest in him, especially if he was willing to consider this a good delivery; that there is in the testimony here no predicate laid for the doctrine of stoppage in transitu, or that plaintiff claimed the right to stop the trees. *Ib.*

52. An entire contract is indivisible—the whole must stand or fall together. But a contract made at the same time, for different articles, at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract, and thus have influenced the sale, had such a failure been anticipated. *Norris* v. *Harris*, 16 Cal. 256.

53. A sale of nine slaves for a gross sum is an entirecontract. There being no means afforded for determining the price of each one, the agreement is implied that the whole are to be taken or none. *Ib.*

54. Where, in a bill of sale of all the cattle of a certain estate, estimated at 7,000 head, a total price being fixed, it was stipulated that the vendee, on arriving in Texas where the cattle were, might choose to take all the cattle of the estate without counting them, in which event he was to notify the agents of the vendors of his choice, and pay an additional $4,000; but if a count was had, and the cattle exceeded or fell short of the estimated num

ber, the excess or deficiency should be paid for at the rate of eight dollars per head; and no count was ever made, and no notification ever given by the vendee that he took the cattle without a count: held, that the vendor, on the facts, cannot recover the $4,000; that the only obligation of the vendee, in the first instance, is to receive the cattle and pay for any excess over the estimated number, if counted; that his liability for the $4,000 depended entirely on his choice to take the cattle without a count, and that this choice was a mere privilege, to be exercised or not, at his option. *Ib.* 257.

55. The vendor, after waiting a reasonable time for the vendee to make his choice, he neglecting or refusing to make it, could fix his liability by making the count himself. *Ib.*

56. The doctrine of election has no application here. That doctrine applies only to cases where the party upon whom rests the performance stands in the same position to both alternatives presented, and is bound to indicate his choice between them. Here, the vendee was bound to choose only in the event he desired to take the cattle without a count. If he did not so desire, he was not required to give notice to that effect. His obligation to pay for any excess was absolute, without any expression of choice; but his obligation to pay the $4,000 was conditional, dependent solely upon the indication of his desire to dispense with the count. *Ib.* 258.

57. Where the doctrine of election is applicable, the right of election, upon failure of the party upon whom the performance rests to indicate his choice, passes to the other side, as in this way only can the obligation become absolute and determinate. *Ib.*

58. Defendant owed B., and to secure the debt, made a bill of sale to him of a wagon and team, and delivered possession. Bill of sale absolute on its face; but there was an agreement between defendant and B., that B. should keep the property until the profits thereof had paid him about $1,000, or until he had been otherwise paid, when the property was to be delivered back to defendant. After this, L., a teamster of B., was directed by him to drive a horse and mule of the team in a wagon to a mill in the neighborhood. L. drove the team to Sacramento instead of the mill. Creditors of defendant there levy on the wagon and animals. Defendant is indicted for larceny; and, after proof on the trial seeking to connect him with driving the team to Sacramento, and its seizure there, he offered to go into a statement of accounts between himself and B., to show that the debt to B. had been paid before L. took the property. Ruled out, on the ground that this matter "must be settled in another court:" held, that the court erred; that the facts sought to be introduced were competent, as tending to explain the transaction, and show the intent with which defendant took the property, or as showing whose property it was, or the general or particular title to it; that all the facts connected with the title and the taking should go to the jury, who can try the question whether the indebtedness had been paid. *People* v. *Stone*, 16 Cal. 371.

See STATUTE OF FRAUDS.

II. BY THE PROBATE COURT.

59. A sale of property under an order of the probate court is a judicial act, and therefore not within the statute of frauds. Caveat emptor is the rule also in these sales. *Halleck* v. *Guy*, 9 Cal. 197.

60. Where the terms of the sale were one-half of the purchase money cash, and the remainder in ninety days, with interest from date of sale at the rate of one per cent. per month, and the purchaser elected to pay the whole amount down: held, that the purchaser is entitled to a reduction for the interest on one-half. *Ib.*

61. If an administrator's sale be void or voidable, the lien of the administrator continues, and it would seem equitable that the purchaser who has paid the debts of the estate, should have a lien upon the estate for the purchase money. *Haynes* v. *Meeks*, 10 Cal. 120.

62. The sale being a proceeding in rem, there may not be any sufficient reason for holding the sale void by reason of a defective notice. *Ib.*

63. W. died, leaving a widow and three minor children. The widow administered, and, as administratrix, presented a petition to the probate court, stating that she had agreed to sell the real estate of the intest-

ate to the plaintiff for $3,000, and to procure an order of the court for the sale, asking the court to confirm this agreement; and asking further, that, if the court should refuse so to confirm, then for a general order of sale upon the petition, which sets up other facts usual in such cases. The court made an order to show cause, etc., and at the same time appointed a guardian for minor and absent heirs, who, on the same day, consented to a decree of sale. No service of the order to show cause was made on the heirs. This decree confirms the agreement with plaintiff, directs a deed to be made to him, and afterwards proceeds to order a rule upon the heirs to show cause why a sale at public auction should not be made. Afterwards a second decree of sale was made in the usual form: held, that this agreement for a private sale did not render the decree of the court for a public sale void; that, although this agreement could not bind the estate, yet it was not against public policy and void. *Stuart* v. *Allen*, 16 Cal. 498.

64. Held, further, to make such agreement void as against public policy, the necessary effect of it must be to contravene some positive right or duty; that the duty of the administratrix is not necessarily inconsistent with an agreement to ask an order of sale upon consideration that a purchaser will give an agreed sum at the sale; that so far as her own interest was concerned, there was no objection to such an arrangement, and if the sale was to be public, probably no good reason exists for holding that the administratrix should not provide or assure herself in this way that, if sold, the property would bring a reasonable price, before proceeding to take steps to have the sale ordered—the propriety of ordering the sale and confirming it afterwards being still left to the court, uninfluenced by any such agreement. *Ib.*

65. Held, further, that the decree is not void because of the defect in the petition, which prays not simply for a decree of sale—the proper course—but seeks, as its main object, the confirmation of the agreement for a private sale to plaintiff; that, though the petition was demurrable for this cause—asking, as it did, what the court could not grant—yet, as the petition presented all the facts necessary to give the court jurisdiction of the matter of sale, it was sufficient to support the decree when attacked collaterally. *Ib.* 499.

66. Held, further, that the decree and proceedings are not void on the ground of inconsistency, in this: that the first order confirms the agreement with plaintiff, and then requires the parties to show cause why the land should not be sold; and the second decree orders the property to be sold, as usual in such cases; that this course was an irregular and improper exercise of jurisdiction; but that these irregularities and defects must be corrected on appeal, and cannot be indirectly attacked. *Ib.*

67. The court had no power to confirm this private sale, and the order to that effect was void; but this act of the court, though an assumption of power, did not divest it of its rightful powers. It had power to order a sale of the land, and this power was exercised by its final or second decree. *Ib.* 500.

68. The power of the probate court to order a sale of the real estate of the deceased results from the fact that the personal estate in the hands of the administrator is insufficient to pay debts. *Ib.*

69. To the exercise of jurisdiction, in ordering a sale of real estate, it is not necessary that there should be a literal compliance with the directions of the statute. A substantial compliance is enough. Nor is it essential that there should be in the petition itself, and without reference to any other paper or thing, a statement of these facts. The main fact required is the averment of the insufficiency of personal assets, and mere formal defects in the mode of statement would not affect the jurisdiction. *Ib.*

70. So far as the question of jurisdiction is concerned, it is immaterial whether the statements of the petition be true or not; the jurisdiction rests upon the averments of the petition, not upon their proof. *Ib.*

71. Where the petition for the sale of real estate, after setting out the debts, proceeds, "that the personal property of said estate, which will appear by reference to the inventory now on file, is not more than is sufficient for the use and support of the family of said decedent, and is wholly insufficient to pay said indebtedness, and that it is necessary to sell real estate to pay the same;" and after giving

some further matter, concludes: "Petitioner further alleges, that the inventory heretofore filed gives a description of all the real estate of which the said intestate died seized, and the condition and value thereof, which said inventory is made a part of this petition": held, that the petition contains a sufficient averment as to the "amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of," within the statute; that the reference to the inventory makes, for all purposes of the reference, the inventory a part of the petition, and the amount of the personal estate is shown by the inventory, as is also the value. *Ib.* 502.

72. The question argued by Justice Baldwin, in *Gregory* v. *McPherson*, 13 Cal. 562, as to the necessity of setting forth—in a petition by an executor to sell real estate—as a jurisdictional fact, the amount of personal estate that has come to his hands, is still open in this court—that case not being authority, because the justices deciding it did not concur in the grounds of their judgment, as appears in the report. *Ib.*

73. The prayer of the petition in this case is in the alternative, and, therefore, the petition, as a pleading, was defective, but this defect does not go to the jurisdiction of the court; but if the true construction of the petition be that it prays for a sale only in the event that the agreement with plaintiff is not confirmed, still, perhaps, even then, the jurisdiction of the court would not be affected. *Ib.*

74. Query, whether, under the act of 1851, relative to the estates of deceased persons, in the petition for the sale of real estate, which shows that the personal estate, whether disposed of or not, is insufficient to pay the debts, it be essential also to aver how much of the personal estate has been disposed of; or whether the sole jurisdictional fact is that required by the one-hundred and fifty-fourth section of the act, making the one hundred and fifty-fifth and one hundred and fifty-sixth sections thereof mere modes to give effect to the substantive power conferred in section one hundred and fifty-four, and hence—like other statutory means to carry out a power—merely directions to the court in the exercise of its jurisdiction, and not conditions to the existence of the jurisdiction. *Ib.*

75. In this case, the petition and inventory referred to therein are to be regarded as one paper, so far as concerns a statement of the facts which they contain; and when the petition states that the personal property of the estate, which will be shown by the inventory, is insufficient, this averment, though informal and indirect, is equivalent to saying that the personal estate mentioned in the inventory is still on hand, and therefore undisposed of. The statement is of a fact existing at the time of the filing of the petition—and that fact is, that the property of the estate is shown by the inventory, and is insufficient to pay the debts, etc.; and if it be the property of the estate, it has not been disposed of. *Ib.* 503.

76. In cases of this sort, where titles to real estate will be injuriously affected by holding probate courts to great strictness of proceeding, a fair and liberal construction should be given to their acts, whenever it can be legally done. *Ib.* 504.

77. Taking the petition and inventory together, in this case, the description of the real estate is not so defective as to render the sale void upon its face. To require an accurate or exact description is too strict a rule. *Ib.*

78. Where upon petition by the administrator to sell real estate of the deceased to pay debts, the usual order for minor and absent heirs to show cause, etc., was entered, and on the same day a guardian ad litem was appointed for such heirs, who on the same day appeared, and consented to an order of sale, which was accordingly then made: held, that this order of sale is not void on the ground that the order to show cause, etc., was not served on the minor heirs, and that the guardian was appointed and the order to show cause was made on the same day. *Ib.*

79. The statute is silent as to the time when the guardian ad litem is to be appointed; and the order of sale is not void because a copy of the order for the minor heirs to show cause was not served on such heirs before said appointment. *Ib.*

80. After the guardian ad litem in this case had appeared and consented to an order of sale, the court had jurisdiction over the subject and the parties. At what time, after this, the court should act on the petition, was within its discretion. *Ib.*

81. Query, whether the various circumstances of this case, the irregularities, the price for which the property was sold, its real value, its consideration, the effect of these things upon the sale, entitle the infant heirs to come into a court of equity to set aside the sale. *Ib.*

82. The point decided here is, that the objections made to the sale are not sufficient to render it void upon the face of the proceedings. *Ib.*

III. On Foreclosure.

83. Where a power of sale is contained in a mortgage, and under a sale by virtue of such power the mortgagor becomes the purchaser, the equity of redemption still attaches to the property in favor of the mortgagor, and he may redeem. *Benham* v. *Rowe*, 2 Cal. 407.

84. Where a sale was irregularly made under a power contained in a mortgage, and the bill filed by the mortgagor did not ask to have it set aside, the sale must stand. *Ib.* 408.

85. But where such sale was not made in cash, but for currency of less value, the mortgagor is clearly chargeable with the highest market value of the lot sold, to be credited to the account of the mortgagor. *Ib.*

86. The sale of the equity of redemption of mortgaged premises, and the assignment of the rents thereof until foreclosure and sale to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured and may be enforced by foreclosure. *Dewey* v. *Latson*, 6 Cal. 616.

87. A mortgagor, after the sale of the mortgaged premises under a decree in a suit to foreclosure the mortgage, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed, but he possesses no right to despoil the property in its fixtures. The deed of the sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor. *Sands* v. *Pfeiffer*, 10 Cal. 265.

88. Under a decree of foreclosure and sale, H. had come into possession of the mortgaged premises. Subsequently, on appeal to the supreme court, the decree was reversed, with direction that the sale under it be set aside, that defendants in the suit be restored to the property sold, and that the court below should proceed to dispose of the case in pursuance of the principles of the opinion. The court below, on filing the remittitur, entered a decree setting aside said sale, restoring defendants to possession, directing plaintiff to deliver up possession; awarding a writ of restitution, in case of refusal, vacating the credit given on the decree of foreclosure—the plaintiff having bought in the property—and ordering an account of the rents and profits and the premises while in the hands of H., with an injunction pending the account: held, that the order of the court below for an account of the rents and profits was right; that the general direction by this court to the court below, to proceed in pursuance of the principles of the opinion of this court, was mere formality, neither giving authority, nor limiting the powers of the court below; that without such direction that court could only act in subordination to the principles declared by this court; that the question of rents and profits being left open by this court, indicated that it was to be passed upon by the court below; that there is no distinction as to the right to have the corpus of the property restored on reversal of the decree under which it was sold, and the restoring of the rents and profits received from its use; and that the restitution of both is essential to making the party whole. *Raun* v. *Reynolds*, 15 Cal. 468.

89. Where a party gets into possession of property, as a water ditch, under a sheriff's sale on a foreclosure of a mortgage, and the judgment on which such sale was made is afterwards reversed by the supreme court, and restitution of the property is ordered, the court below may, on motion, order such party in possession to account before a referee for the rents and profits received by him—that is, for the sales of water, etc. The right to such rents and profits being clear, the court will not, on a mere question of remedy, compel a direct suit for them. *Ib.* 469.

90. The party so in possession, under sheriff's sale, is in no better position than if it be entered directly under the mortgage to enforce which the sale was made; and having received the proceeds of the

property by way of sales of water, and appropriated the same to his own use, he cannot hold the property bound by the mortgage, and at the same time refuse to give the mortgagor the benefit of the amount so received. In equity he is not a purchaser, but a mortgagor; and though the sale was not set aside until after the receipts of the rents and profits, still, when it was set aside, the order took effect upon the relations of the parties as they existed before the sale—the mortgagor and the mortgagee have the same rights they had before. *Ib.* 471.

91. The owner of the mortgaged premises, where no power of sale is embraced in the mortgage, cannot, under any circumstances, be cut off from his estate, except by sale in pursuance of the decree of the court. To give validity to such decree, the owner must be before the court when it is rendered. No rights which he possesses can otherwise be affected, and any direction for their sale would be unavailing for any purpose. A mortgagor, when he has not disposed of his interest, is a necessary party to a suit for a foreclosure and sale under our law, even though no personal claim be asserted against him. The fact that a mortgage is executed upon the premises does not, of itself, authorize proceedings for their sale without making him a party. He has a right to be heard before his estate can be subjected to sale to satisfy any alleged lien, without reference to any personal claim against himself. If he has parted with the estate, his grantee stands in his shoes, and possesses the same right to contest the lien and to object to the sale. The object of the sale is to subject such estate as the mortgagor held at the time to the satisfaction of the lien which he created, and if that estate has been disposed of, a decree directing its sale without the presence of its owner would be a mere arbitrary act, condemning, without hearing, one man's property to pay another man's debt. It is only when the owner of the estate has had his day in court, that a valid decree can pass for its sale. *Goodenow* v. *Ewer*, 16 Cal. 468; *Boggs* v. *Hargrave*, 16 Cal. 566.

See MORTGAGE.

IV. OF A VESSEL.

92. A sale of a vessel of the United States at sea, to a foreigner, forfeits her national character, unless the new owner pursues all the requisites of the law to obtain a new registry within five days after her arrival at a port of the United States. *Davidson* v. *Gorham*, 6 Cal. 347.

93. To authorize the captain of a vessel to pledge or sell the property of his owners for necessaries, certain facts must be established. The vessel must be in a foreign port, the voyage must be unfinished, the pledge or sale must be indispensable to enable the ship to complete her voyage. *Marziou* v. *Pioche*, 8 Cal. 534.

94. Where a sale of a vessel is made part cash and the balance of the purchase money to be paid upon delivery by the vendor to the vendee of a good title and register of a vessel, to recover the balance the vendor must show an offer on his part to comply with the agreement. *Fowler* v. *Fisk*, 12 Cal. 112.

V. SALE ON EXECUTION.

95. Under proceedings in admiralty in rem, the interest of one part owner cannot be sold to satisfy a demand due from the vessel itself. *Loring* v. *Illsley*, 1 Cal. 29.

96. All the public streets of San Francisco running into the water, as laid down in the official map of the city, were by operation of the act of March 26th, 1851, extended and carried to the front line of the city, and as such are subject to the free enjoyment of the public and exempt from executions against the city. *Wood* v. *City of San Francisco*, 4 Cal. 193.

97. The statute regulating sheriff's sales of real estate does not design to invest the purchaser with a title until six months after the sales. *Duprey* v. *Moran*, 4 Cal. 196.

98. The nature of the interest to be sold under a decree of sale is sufficiently ascertained by a lease which is referred to and described in the decree. *Gaskill* v. *Moore*, 4 Cal. 235.

99. A purchaser at sheriff's sale acquires no right whatever against the sheriff for property sold, unless at the time of the sale he pays down in cash the whole of

the purchase money. *People* v. *Hays*, 5 Cal. 68.

100. The right of a party to have his title to land protected from a sale which may create a cloud upon it, upheld. *Guy* v. *Hermance*, 5 Cal. 75.

101. If the sheriff, before a sale of real estate under execution, neglects to give the proper notice, the statute gives an adequate remedy against an officer; but it is not sufficient to set aside or avoid a sale. *Smith* v. *Randall*, 6 Cal. 50.

102. A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money on the ground that he is entitled to it as oldest judgment and execution creditor, especially where there is a contest as to the priority of his lien. *Williams* v. *Smith*, 6 Cal. 91.

103. It is error to decree that the sheriff should execute a deed to the purchaser on the foreclosure sale, the land sold being subject to redemption. *Harlan* v. *Smith*, 6 Cal. 174.

104. A party who purchases stock of an incorporation sold under execution, knowing they were under hypothecation, is chargeable with notice of the fact, and takes subject to the claim of the pledge. *Weston* v. *Bear River and Auburn W. and M. Co.*, 6 Cal. 429.

105. Great inadequacy of consideration paid for land is sufficient to put the purchaser upon notice of a fraud by his vendor in the purchase thereof on execution at a constable's sale. *Argenti* v. *City of San Francisco*, 6 Cal. 679; *Hart* v. *Burnett*, 15 Cal. 608.

106. A purchaser at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor before the expiration of six months allowed for redemption, as often as the rent becomes due, under the terms of the lease existing when he purchased. *Reynolds* v. *Lathrop*, 7 Cal. 46.

107. The regularity of a sheriff's sale cannot be impeached by a stranger, or in a collateral proceeding. *Kelsey* v. *Dunlap*, 7 Cal. 162.

108. Tenants in common, or partners, have a right to acquire their cotenant's or copartner's interest by purchase under an execution sale, there being nothing in their relations to forbid it. *Gunter* v. *Laffan*, 7 Cal. 593.

109. Where a party purchased real estate at an execution sale upon the faith of the representations of a judgment creditor that his judgment was the first on the property, when in fact there were prior incumbrances on it of more than its value: held, that the purchaser should be relieved and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. *Webster* v. *Haworth*, 8 Cal. 25.

110. After the adoption of the common law in 1850, the municipal and common lands of pasturage were liable to execution sale. *Welch* v. *Sullivan*, 8 Cal. 197; contra *Hart* v. *Burnett*, 15 Cal. 616. See *Holladay* v. *Frisbie*, 15 Cal. 634; *Wheeler* v. *Miller*, 16 Cal. 125.

111. A sale under a void judgment passes no title. If the judgment is merely voidable, the sale is good. *Gray* v. *Howes*, 8 Cal. 568.

112. In an action against a purchaser at sheriff's sale for not paying the amount of his bid, it cannot be set up as a defense that no sufficient notice of the sale was given. *Harvey* v. *Fisk*, 9 Cal. 94.

113. The title to real estate sold under execution does not pass until the execution and delivery of the sheriff's deed. *Anthony* v. *Wessel*, 9 Cal. 104.

114. A purchaser at a sheriff's sale may have a lien upon the property prior to that of the redemptioner. *Knight* v. *Fair*, 9 Cal. 118.

115. The interest of a miner in his mining claim is property, and may be taken and sold under execution. *McKeon* v. *Bisbee*, 9 Cal. 142.

116. Where parties claim under a deed executed by the sheriff upon a sale on execution, they are chargeable with notice of defects in the judgment upon which the execution issued. *Wells* v. *Stout*, 9 Cal. 497.

117. An execution issued under a judgment of the district court rendered in 1850, before the judgment was signed by the district judge, is void, and a sale under such execution passes no title to the purchaser. *Ib.*

118. A sheriff may be enjoined from selling real property belonging to the wife under an execution against the husband. *Alverson* v. *Jones*, 10 Cal. 12.

119. A complaint against a sheriff and his sureties for selling under execution the

homestead of plaintiffs, which sets out that the sheriff was in possession of a certain execution against plaintiff J. Kendall, and under color of said execution wrongfully and illegally entered upon and sold certain property, the homestead of the plaintiffs, and averring in the sum of two thousand dollars, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action. *Kendall* v. *Clark*, 10 Cal. 18.

120. No damage can result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at such sale could acquire no right to the property, nor could the plaintiff suffer any injury. *Ib.*

121. A sheriff is not protected in the sale of personal property by the verdict of the jury in a trial of the right of property, under the provisions of section 218 of the code. *Perkins* v. *Thornburgh*, 10 Cal. 192.

122. A party may enjoin a sale of his property on execution against another for the other's debt. *Hickman* v. *O'Neal*, 10 Cal. 294.

123. The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff on an execution against one of the partners. *Waldman* v. *Broder*, 10 Cal. 380; *Jones* v. *Thompson*, 12 Cal. 198.

124. D. purchased a lot of land at sheriff's sale on execution, entered and improved the same. Afterwards D. removed the buildings. On that day the defendants in execution sold the premises to T., who then redeemed the lot, and then sued D. for the value of the buildings: held, that as there was no evidence that the buildings were attached to the premises sold, T. cannot recover. *Tyler* v. *Decker*, 10 Cal. 436.

125. Until a consummation of a sale of real property upon execution is made by a conveyance from the sheriff, the estate remains in the judgment debtor. Until then the purchaser possesses only a right to an estate, which may afterwards be perfected by conveyance. *Cummings* v. *Coe*, 10 Cal. 531.

126. The sheriff can only seize and sell an interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. *Jones* v. *Thompson*, 12 Cal. 198.

127. In such case the decree should not order a private sale of the firm property. The selling of cattle, sheep, etc., at private sale is dangerous as a precedent, and liable to great abuse in practice. *Ib.*

128. The registration act only protects purchasers' creditors as such, are not included within its provisions. But a judgment creditor purchasing at his own sale without notice is a bona fide purchaser within the act. *Hunter* v. *Watson*, 12 Cal. 377.

129. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all of its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy, and announced at the sale. *Crandall* v. *Blen*, 13 Cal. 23.

130. The purchaser at sheriff's sale of a water ditch is entitled to the rents and profits thereof from the date of the sale till the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant. *Harris* v. *Reynolds*, 13 Cal. 516.

131. A party in possession of premises under sheriff's sale, and receiving rents and profits during the time for redemption, should in equity, as between him and defendant in execution, pay the taxes assessed while he is so in possession. If the owner does not pay them, then the statute requires the party in possession to pay. *Kelsey* v. *Abbott*, 13 Cal. 619.

132. S. & B. in 1854 execute a mortgage on their property to H. Subsequently they execute another mortgage on the same property to plaintiff. Later, in 1855, S. conveys his interest to N., the deed declaring the interest to be sold subject to the two mortgages. Later, V. sells to defendant W., the deed containing the same recital as the last. In February, 1856, a decree of foreclosure of the first mortgage to H., sale of the property thereunder, defendant W. the purchaser, and in due time a sheriff's deed to him and possession. In June, 1855, foreclosure of the second mortgage to plaintiff, sale thereunder, plaintiff the purchaser, and in March, 1857, sheriff's deed to him: held, that the plaintiff cannot maintain ejectment against defend-

ant W. on his sheriff's deed; that defendant claiming title through foreclosure of the first mortgage, and being in possession, cannot be dispossessed by B. *Brown* v. *Winter*, 14 Cal. 34.

133. A certificate of the sheriff of the purchase of property, as that of the defendant in execution, is not sufficient to entitle the holder to redeem as such successor, at least, not until the expiration of the six months. *Haskell* v. *Manlove*, 14 Cal. 58.

134. On mandamus by the assignee of a sheriff's certificate of the sale to compel execution of a deed, the question whether such certificate is not merged in a deed made to the assignee of the execution debtor after the sale cannot be tried. The right to the deed is the only matter in controversy. *People* v. *Irwin*, 14 Cal. 436.

135. Where a party to a judgment has obtained any advantage through the judgment, he must restore that advantage to the other party if the judgment be afterwards reversed. *Reynolds* v. *Harris*, 14 Cal. 679.

136. If, on sale under judgment, the plaintiff buys in the property, he must restore it to the defendant on reversal of the judgment. Otherwise, as to a stranger, a bona fide purchaser without notice. He is not within the rule. But to constitute himself such a purchaser, he must show that he has paid the purchase money, and also that he is the purchaser of the legal title, not of a mere equity. And a purchaser at execution sale is not clothed with the legal title until he receives a sheriff's deed. *Ib.* 680.

137. An assignee of a judgment and of the sheriff's certificate of a sale thereunder stands in the same position as his assignor, the plaintiff, after the judgment has been reversed, and the sale will be set aside and the property restored to the defendant where no loss or injury will be done the assignee. *Ib.* 681.

138. Defendant, as coroner and acting sheriff, levied on and advertised for sale all the right, title and interest of T. in certain horses and cattle in the hands of a receiver appointed in a suit between J. and T., as partners: held, that plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable; and that this must appear by a clear showing of the plaintiff's right to the property and defendant's insolvency. *More* v. *Ord*, 15 Cal. 206.

139. The municipal lands to which the city of San Francisco succeeded as a pueblo were held in trust for the public use of the city, and were not, either under the old government or the new, the subject of seizure and sale under execution. *Hart* v. *Burnett*, 15 Cal. 616.

140. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition, either precedent or subsequent, annexed to the grant; and the property mentioned in the act is not devoted by the grant of the State to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is a leviable interest, subject to sale under execution. *Holladay* v. *Frisbie*, 15 Cal. 636; *Wheeler* v. *Miller*, 16 Cal. 125.

141. *Smith* v. *Morse*, 2 Cal. 524, deciding that the city's interest in this beach and water lot property can be sold on execution against the city, not to be disturbed; but any rights which "the commissioners of the funded debt of the city of San Francisco," under the act of May 1st, 1851, may possess in this property are not passed on. *Holladay* v. *Frisbie*, 15 Cal. 637.

142. A purchaser of beach and water lot property at a sheriff's sale, in August, 1851, on execution issued upon a judgment recovered in January, 1851, against the city of San Francisco, acquired a title, if the judgment became a lien upon the property sold previous to the act of May 1st, 1851, and the conveyance from the commissioners of the sinking fund to the commissioners of the funded debt. *Wheeler* v. *Miller*, 16 Cal. 125.

143. In this case, as the record does not show that the judgment ever became such lien, the decision, giving title to the purchaser, must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. *Ib.*

144. The lien of a judgment is purely the creature of statute, and in this State the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court. *Ackley* v. *Chamberlain*, 16 Cal. 182.

See EXECUTION.

VI. CAVEAT EMPTOR.

145. Caveat emptor applies in sales of real estate, where there is no fraud, warranty, &c. *Salmon* v. *Hoffman*, 2 Cal. 141.

146. Ordinarily, the maxim of caveat emptor applies to judicial sales, but it has many limitations and exceptions. *Webster* v. *Haworth*, 8 Cal. 26; *Halleck* v. *Guy*, 9 Cal. 197.

147. A bill of sale for a mining claim, not under seal and without warranty, which only purports to convey to the vendee the right, title and interest of the vendor, will not pass the title, although the vendor is in possession at the time, if such possession is without title. The doctrine of caveat emptor applies to all such cases. *Clark* v. *McElvy*, 11 Cal. 160.

148. The doctrine of caveat emptor applies only to sales made upon valid judgments; and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases, a defect of title is no ground for interference with the sale, or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy, or the lien of the judgment; and that he may possibly acquire nothing. *Boggs* v. *Hargrave*, 16 Cal. 564.

149. A somewhat different rule prevails in cases where particular property is the subject of sale, by a specific adjudication; as where the interest of A. in a certain tract is decreed to be sold. To the validity of a decree of this character, the presence of A. is essential; and when present, the decree binds him and is effectual, by the sale it orders, to transfer his estate. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest may not constitute a valid title; it may not, in fact, be of any value; and the purchaser takes that risk. To that extent the doctrine of caveat emptor applies even in those cases, and in all cases of adjudication upon specific interests, but no further. The interest specially subject to sale, whatever it may be worth, a purchaser may be entitled to receive; it is for that interest he makes his bid and pays his money. *Ib.*

SAN FRANCISCO.

I. IN GENERAL.

1. There was no officer in San Francisco who, according to the Mexican law, was authorized to record mortgages, and unless there was, a mortgagee was not bound by the rule of notice to subsequent encumbrancers. *Woodworth* v. *Guzman*, 1 Cal. 205.

2. Alcaldes in San Francisco were empowered to perform the functions of judges of first instance, in those districts where there were no such judges. *Mena* v. *Leroy*, 1 Cal. 220.

3. The common council of the city of San Francisco has no authority under the charter of the city, of 1850, to impose a penalty of one per cent. per day for the nonpayment of an assessment. *Weber* v. *City of San Francisco*, 1 Cal. 456.

4. The recorder of the city of San Francisco has the right to award the punishment for the crime of assault and battery affixed by the statute on crimes and punishments. *People* v. *Ah King*, 4 Cal. 307.

5. The thirty-second section of the charter of 1855, of the city of San Francisco, was designed as a check upon the city gov-

ernment under that charter, leaving the previous indebtedness to stand as a matter the legislature could not interfere with. *Soule* v. *McKibben*, 6 Cal. 143.

6. The limitation fixed by that section upon the amount of indebtedness that could be lawfully incurred by the city, refers only to indebtedness under the charter, not computing the previous debt, funded or unfunded. *Ib.*

7. Where the city ordinance authorizes the making of a contract by certain committees on behalf of the city, "subject to confirmation by the common council for said city," a confirmation by joint resolution, and not by ordinance, is sufficient. *San Francisco Gas Co.* v. *City of San Francisco*, 6 Cal. 191.

8. The rejection of the plaintiff's claim against the city by the board of examiners only denies him the privilege of funding it, but does not impair the obligation of the contract or plaintiff's right to prosecute it. *Ib.* 192.

9. There is no constitutional inhibition against incorporating a portion of the inhabitants of a county as a city, or creating a county out of the territory of a city. *People* v. *Hill*, 7 Cal. 103; *People* v. *Mullins*, 10 Cal. 21; *People* v. *Beatty*, 14 Cal. 572.

10. The act consolidating the city and county of San Francisco is not unconstitutional. *People* v. *Hill*, 7 Cal. 104; *People* v. *Mullins*, 10 Cal. 21; *People* v. *Beatty*, 14 Cal. 572.

11. The consolidation act of the city and county of San Francisco gives the officers named in the fourteenth section two days after the meeting of the board of supervisors in which to file new bonds. The meeting taking place on the ninth of July, the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane* v. *Scannell*, 7 Cal. 395; *People* v. *Scannell*, 7 Cal. 438.

12. The act of 1851, creating the board of fund commissioners of San Francisco, was a law authorizing a contract between the city and her creditors, who surrendered the old indebtedness and took a new security bearing a different rate of interest. This transaction was in the nature of a new contract, and the law authorizing it entered into and became part thereof, and cannot be altered or amended so as to impair or destroy the rights of parties under the contract. *People* v. *Woods*, 7 Cal. 584.

13. The provision of the consolidation act of 1856, requiring that the sinking fund created by the act of 1851 should be first exhausted by the redemption of certificates of stock before the treasurer should make payment annually of the sum of fifty thousand dollars, set apart by the first act for the payment of interest and for the sinking fund, are unconstitutional. *Ib.*

14. The recorder of the city of San Francisco is authorized by law to take acknowledgments of mortgages and conveyances. *Hopkins* v. *Delany*, 8 Cal. 87.

15. An account audited against the city of San Francisco, but not paid at the time the consolidation act went into effect, need not again be audited to entitle it to payment. *Knox* v. *Woods*, 8 Cal. 546.

16. The salaries of teachers, under the consolidation act, should be paid in the same manner as other claims against the treasury. *Ib.*

17. An act of the legislature authorizing and directing the board of supervisors of the city and county of San Francisco to audit and allow the claim of a judgment creditor is not unconstitutional, as being judicial in its character. *People* v. *Supervisors of San Francisco County*, 11 Cal. 211.

18. The board of supervisors of the city and county of San Francisco have no control over the treasurer in the payment of the interest and principal of the sinking fund of that city. The allowance or disallowance, auditing or refusing to audit of the board, are alike immaterial. *People* v. *Supervisors of San Francisco County*, 12 Cal. 301.

19. The act of 1858, amendatory of the act of May 1st, 1851, authorizing the "funding of the floating debt of the city of San Francisco and to provide for the payment of the same, is constitutional." The amendment, that the commissioners may purchase stock at five per cent. above par, does not affect injuriously the creditors under the act of 1851. *Thornton* v. *Hooper*, 14 Cal. 11.

20. An indictment in the court of sessions, in San Francisco, may be entitled either as of the county of San Francisco or as of the city and county of San Francisco. *People* v. *Mullins*, 10 Cal. 21; *People* v. *Beatty*, 14 Cal. 571.

21. The place of pilot in the port of San Francisco is an office. *People* v. *Woodbury*, 14 Cal. 45.

22. The fire department of San Francisco is not a mere voluntary association, but is a branch of the municipal government of that city. *People* v. *Board of Delegates of the San Francisco Fire Department*, 14 Cal. 497.

23. An assistant prosecuting district attorney appointed by the board of supervisors of the city and county of San Francisco, under the act of April 23d, 1858, (238) is not limited in his official action to any particular class of cases. The true construction of the statute is, that he shall be prosecuting attorney in the police court and shall assist the district attorney in the discharge of his various duties. *People* v. *Magallones*, 15 Cal. 428.

24. One of these duties is the prosecution of charges before the grand jury, and if the assistant may perform the duty, he must be deemed to be clothed with the powers and privileges necessary for that purpose. While acting for the district attorney, his acts possess the same validity and must be regarded in the same light as if done by that officer in person. *Ib.* 429.

25. It is no objection to an indictment found in said court of sessions, that such assistant prosecuting district attorney was present during the session of the grand jury while the charge embraced in the indictment was under consideration. *Ib.*

26. The charter of the city of San Francisco of 1851 gave the city power to open streets and alleys and to alter and improve the same, and this power includes authority to enter into contracts for that purpose, binding upon the city. And this, notwithstanding section two, article five of that charter, providing that the adjacent property shall bear two-thirds of the expense of every improvement. This section simply made the property holders liable to the city for the two-thirds, and the remedy of the city was by assessments on the property, and such assessments, when collected, go into the city treasury to be used as the city sees fit. *Argenti* v. *City of San Francisco*, 16 Cal. 263.

27. The provision in section five, article three of the charter of 1851, as to not creating liabilities beyond $50,000, over and above the annual revenue of the city, etc., is directory, and not a limitation upon the power of the city to contract debts. *Ib.* 264.

28. The legal effect of this provision is entirely different from the clause in the eighth article of our constitution, prohibiting the legislature from creating debts against the State. *Ib.*

29. Plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which contracts were executed by such officer in his official capacity, made valuable and permanent improvements to the city, for the exclusive benefit of it and its inhabitants; such improvements were made under the immediate supervision of an officer of the city, and when completed, were approved of and received by him on behalf of the city; plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay, as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition to pay: held, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their performance, it would be a fraud on plaintiff to permit her now to repudiate them. *Ib.* 274.

30. The mayor and controller of said city having drawn warrants on the treasrer thereof, payable out of the street assessment fund, in favor of plaintiff, for the improvements so made under said contracts: held, that plaintiff cannot recover on the warrants; that being payable out of a particular fund, they are neither bills of exchange nor promissory notes, and that the treasurer must pay from that fund and no other. *Ib.*

31. Nor can plaintiff recover on some of the warrants so drawn, for the further reason, that they do not specify the appropriations under which they were issued, nor the date of the ordinances making the same, as is required by the eighth section of the third article of the city charter; and they would not constitute any authority to

the treasurer to pay them, even if there were funds in the treasury specially appropriated for their payment. *Ib.* 275.

32. The common council of the city of San Francisco passed an ordinance authorizing the street commissioner to advertise for proposals to grade, plank and sewer a portion of Mission street, in said city, "the same to be paid for by the property holders adjacent * * the proposals to be opened and awarded by the street commissioners, with the committees on streets from both boards of aldermen." This ordinance was published for ten days successively in a daily newspaper of the city, and the advertisement required was made in like manner for the same period. Proposals, based upon certain specifications, were received under the ordinance, and opened by the committee of the two boards and the commissioner, and the work awarded to B. Subsequently, an instrument was executed by B., as contractor, and by the street commissioner, purporting to act in the name of the city, setting forth the acceptance by the city of B.'s proposal, and an agreement by her to pay him for the work at certain designated rates, and an agreement on his part to do the work to the satisfaction of the city and the street commissioners. B. began the work, and afterwards transferred his contract and his interest therein to plaintiff, who completed the work in the best manner, and to the satisfaction of the street commissioner and the city. The work was measured as it progressed by the city's engineer, who duly certified to the accounts for the same, which accounts were duly audited, and upon them warrants were drawn by the controller, by authority of the city, and delivered to plaintiff. The warrants were presented to the treasurer, and payment demanded and refused, on the ground that there were no funds in the treasury applicable to them. Previous to the demand, assessments had been duly levied by the city upon the property adjacent to the improvements, to meet their expenses, and these assessments had been collected by the collector of street assessments, and by him paid into the city treasury. Plaintiff sues the city, as liable either on the express contract, or upon the warrants, or upon implied contracts, for the services rendered and materials furnished, or for money received by defendant to his use: held, that, as under the charter, the city had authority to order the improvements in question, the acceptance of the proposals of B. by the street commissioner and the committee of the two boards converted what were previously mere propositions on the part of the city into contracts, perfect in all their parts, binding alike upon the city and the contractor. *Ib.* 277.

33. Held, further, that the city is primarily liable; that she, and not the contractor, must look to the property holders adjacent to the improvements, for the necessary expenses; that the property holders are not parties to the contracts; that the city must levy and collect the assessments; that the contractor has no claim upon the property or the property holders, but must look alone to the city; that the clause in the ordinance as to how the improvements shall be paid for is only a designation of the sources upon which the city relies for payment. *Ib.* 282.

34. In this case, the city having discharged the assessments by receiving in payment thereof outstanding warrants, she is primarily liable to plaintiff as for moneys received to his use, even on the theory that she acted simply as the agent of the plaintiff in collecting the assessments. *Ib.* 283.

35. The city would not be liable independent of the contract made by her acceptance of the proposals of the contractor. A municipal corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements of a local nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability as upon implied contracts, has no application to cases of this character. *Ib.*

36. The doctrine applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes upon the city the obligation to do justice with respect to the same. *Ib.*

37. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to

her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner, from the like general obligation. *Ib.*

38. In these cases, the city does not make any promise, but the law implies one, and it is no answer to a claim resting upon such implied contract, to say no ordinance has been passed, or that the liability of the city is void when it exceeds the limitation of $50,000 prescribed by the charter. *Ib.*

39. To fix the liability of the city in respect to money or other property, the money must have gone into her treasury or been appropriated by her, and the property must have been used by her, or be under her control. *Ib.*

40. In case of services rendered, the acceptance of the services must be evidenced by ordinance to that effect. Their acceptance by the city, and the consequent obligation to pay them, cannot be asserted in any other way. If not originally authorized, no liability can attach upon any ground of implied contract. *Ib.*

41. The improvements in this case—being to particular streets—were local in their character, and though to some extent of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood. The advantages resulting from them do not constitute that kind of general advantage to the city, from the existence of which any liability to pay for the same can be inferred. The general doctrine that when one takes a benefit which is the result of another's labor he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediate to the adjacent property holders, and only indirectly to the city at large. *Ib.*

42. As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money, or other property, which does not belong to her, and to liabilities springing from neglect of duties imposed by her charter, from which parties are enjoined. *Ib.* 284.

43. Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter—as for instance, upon the issuance of bills of credit. *Ib.*

44. The warrants in this case, drawn by the controller and countersigned by the mayor of San Francisco upon the treasurer, to pay for certain street improvements, will not support an action. They cannot be treated as bills of exchange or promissory notes, for they are drawn upon a particular fund, and their payment is made to depend upon the sufficiency of that fund, while bills and notes must be payable absolutely. *Martin* v. *City of San Francisco*, 16 Cal. 286.

45. These warrants are ineffectual for any purpose, except, perhaps, as evidence in an action founded upon the consideration for which they were given. *Ib.*

46. These warrants, with few exceptions, do not comply in their form with the requirements of the city charter, and would not constitute any authority to the treasurer to pay them, even if funds were in the treasury especially appropriated for their payment, because they do not specify the appropriations under which they were issued, and the date of the ordinances making the same. *Ib.* 287.

47. The act of April 21st, 1860, relative to pilots in the port of San Francisco, did not legislate out of office pilots licensed under acts repealed by the act of April 21st, whose terms of office had not expired when this act went into operation. *People* v. *Abbott*, 16 Cal. 365.

48. In *quo warranto* for an alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp and enjoy the office without a license, and also contains allegations as to the right of relator to the office: held, that these allegations as to the right of relator cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office. *Ib.*

II. Lands in San Francisco.

49. *If San Francisco was a pueblo under the Mexican government, that was a fact which should be established by proof, and of which courts cannot and ought not to take judicial notice, and the land in con-*

troversy should be shown to be within the pueblo limits. Woodworth v. *Fulton*, 1 Cal. 307; overruled in *Payne* v. *Treadwell*, 16 Cal. 232.

50. *Lands lying within the corporate limits of San Francisco, and which had not been granted by the Mexican government or its officers previous to the conquest of the country by the American forces, constitute a part of the public domain of the United States, and cannot be granted away except under the authority of Congress. Woodworth* v. *Fulton*, 1 Cal. 307; overruled in *Cohas* v. *Raisin*, 3 Cal. 450; *Welch* v. *Sullivan*, 8 Cal. 199; *Hart* v. *Burnett*, 15 Cal. 616.

51. Mexican justices of the peace had authority before the war to make grants of land in San Francisco. *Reynolds* v. *West*, 1 Cal. 327.

52. What is termed the "swinging of lots," a measure adopted in pursuance of a resolution of a public meeting in San Francisco, cannot change the location of premises actually granted, or impair the right of a grantee therein. The taking of a part of a lot from an individual for the purpose of a public street, though it may, perhaps, give him claim on the public for compensation, does not confer upon him the right to encroach to the same extent on the land of his neighbor. *Ib.*

53. Whether driving piles in a street extended into the bay of the city of San Francisco is an obstruction to the free use of the street by the public, is a question of fact for the jury to pass upon. *City of San Francisco* v. *Clark*, 1 Cal. 386.

54. The city of San Francisco could not take property in the possession of another for the purpose of a public slip without paying an adequate compensation, where the title is not in the city. *Gunter* v. *Geary*, 1 Cal. 465.

55. The act of the city in creating a sinking fund commission, and the deed executed to them of all the property to the city, is void from want of power in the city, and because said deed is within the statute of frauds. *Smith* v. *Morse*, 2 Cal. 557.

56. In a plan of the city, the survey into blocks, lots and streets extended into the tide waters in front of the city, the object of which was to reach a sufficient depth of water on the land line for the convenience of shipping. *Eldridge* v. *Cowell*, 4 Cal. 87; *Wood* v. *City of San Francisco*, 4 Cal. 193; *Minor* v. *City of San Francisco*, 9 Cal. 45.

57. It was necessarily anticipated that the water lots would be filled up to a level suitable for building or land carriage. *Eldridge* v. *Cowell*, 4 Cal. 87.

58. Without express authority, neither the mayor nor the commissioners of the funded debt of San Francisco, nor any or either of them, by virtue of their office or otherwise, are authorized to redeem under the code lands of the city sold under execution against her, nor can the city attorney ratify their act of redemption by plea after suit brought. *People* v. *Hays*, 4 Cal. 146.

59. The act of March 26th, 1851, which requires the city of San Francisco to deposit in the office of the secretary of state a map of the water lot property, granted to the city by the same act, does not make such map conclusive evidence of the extent of said property, as the boundaries are completely specified in the act, and the question of what was the water line of the city at the date of the act is one of fact. *Cook* v. *Bonnet*, 4 Cal. 398.

60. Where a party sues for a lot in the former pueblo of San Francisco, and deraigns his title from the city, he is prima facie entitled to recover. *Seale* v. *Mitchell*, 5 Cal. 402.

61. A sale of land in the city of San Francisco by a portion of the board of commissioners of the funded debt does not pass a legal title upon which ejectment can be maintained. *Leonard* v. *Darlington*, 6 Cal. 123.

62. The charter of San Francisco provides that no ordinance or resolution shall be passed except by a majority of all the members elected. The number of members elected being eight: held, that an ordinance passed by a vote of four in the affirmative to three in the negative for the sale of city lands was not passed by a majority of all the members elected, and was therefore void. *City of San Francisco* v. *Hazen*, 5 Cal. 171.

63. *Where an ordinance for the sale of the city property was passed without the majority required by the charter, and before the sale another ordinance was legally passed, appropriating a portion of the proceeds to arise from the sale: held, that the second ordinance was a sufficient*

recognition of the first to render the sale valid and binding on all parties. Holland v. *City of San Francisco*, 7 Cal. 375; overruled in *Mc Cracken* v. *City of San Francisco*, 16 Cal. 622.

64. The charter of the city of San Francisco provides that when the common council think proper to open or improve a street, etc., notice shall be given, and if no protest be made as provided, then the council shall proceed with the improvement: held, that when an ordinance had passed to give the required notice, which was given and no protest made, the full discretionary power of the council had been exercised, and it became binding as a contract between the city and the property holders to make the improvement, the remaining acts on the part of the city being mere ministerial duties on the part of its officers. *Lucas* v. *City of San Francisco*, 7 Cal. 473.

65. The act of the twenty-seventh of March, 1851, granted to the city of San Francisco certain beach and water lot property in San Francisco for ninety-nine years. The sale to defendant of a portion thereof by the State board of land commissioners, under the act of May 18th, 1853, granted nothing but the State's reversionary interest. *Chapin* v. *Bourne*, 8 Cal. 296.

66. The Leavenworth alcalde grants could not pass title or affect the beach and water lot property in San Francisco, except so far as conceded by the act of March 26th, 1851, and upon a compliance with the requisitions thereof. *Ib.*

67. Alcalde grants of beach and water lots in San Francisco, not recorded on or before the third of April, 1850, in some book of record in the possession and under the control of the recorder of San Francisco, are void. *Ib.*

68. The confirmation of the title of the city of San Francisco, by the board of United States land commissioners, and the dismissal of the appeal by the attorney general, have settled that no title to lands within the limits of that city can hereafter be acquired from the United States. *Norton* v. *Hyatt*, 8 Cal. 540.

69. The regulations of forbidding grants to be made within two hundred varas of the water line of the bay, had reference only to a portion of the present city front. *Ib.*

70. Where the owner of a lot neglects for three days after notice from the superintendent of public streets of said city, to repair the street in front of his lot, the superintendent has the right to make a contract for that purpose; and an action will lie in the name of the party performing the work against the owner of the lot adjacent for the amount. *Hart* v. *Gaven*, 12 Cal. 477.

71. The legislature had the right to provide, in the act known as the consolidation act for the government of the city and county of San Francisco, that the owners of lots in said city should keep the streets in front of their lots in repair. *Ib.*

72. The act of March, 1851, commonly called the San Francisco water lot act, should be construed favorably to the city, and includes all land within the boundaries fixed by the survey referred to in the act, and there is nothing in the act of May, 1851, which indicates any intention on the part of the legislature to exclude the public slips from the act of March, 1851. *Hyman* v. *Read*, 13 Cal. 451.

73. The ayuntamiento of San Francisco, in 1850, by an order, authorized its alcalde to grant to plaintiff "a quantity of land in conformity with the survey of the town as near as possible to the location of" certain other lots which the plaintiff was to surrender to the town. The alcalde accordingly conveyed by deed to plaintiff a lot which had been previously granted by the town to one Gerke: held, that an action for the breach of covenants of warranty in this deed will not lie against the city. *Findla* v. *City of San Francisco*, 13 Cal. 535.

74. The board of commissioners of the old sinking fund of 1850, created by an ordinance of the city of San Francisco, had no power to sell the real estate of the city, the ordinance being void. But this decision has no application to the board of commissioners of the funded debt, organized after the dissolution of the first board of the sinking fund commissioners. *Heydenfeldt* v. *Hitchcock*, 15 Cal. 514.

75. San Francisco was at the date of the conquest and cession of California, and long prior to that time, a pueblo, entitled to and possessing all the rights which the law conferred upon such municipal organ-

izations. *Hart* v. *Burnett*, 15 Cal. 616; *Payne* v. *Treadwell*, 16 Cal. 225.

76. Such pueblo had a certain right or title to the lands within its general limits; and the portions of such lands which had not been set apart, or dedicated to common use, or to special purposes, could be granted in lots by its municipal officers to private persons in full ownership. *Hart* v. *Burnett*, 15 Cal. 616.

77. The authority to grant such lands was vested in the ayuntamiento, and in the alcaldes or other officers who at the time represented it, or had succeeded to its "powers and obligations." *Ib.*

78. The official acts of such officers in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority. *Ib.*

79. These municipal lands to which the city of San Francisco succeeded, were held in trust for the public use of that city, and were not, either under the old government or new, the subject of seizure and sale under execution. *Ib.*

80. This property and these trusts were public and municipal in their nature, and were within the control and supervision of the State sovereignty, and the federal government had no such control or supervision. *Ib.*

81. The act of the State legislature of March, 1858, confirming the so-called Van Ness ordinance, was a legal and proper exercise of this sovereign power; and this act gave full effect to the provisions of that ordinance, and vests in the possessors therein described, as against said city and State, a title to the lands in said ordinance mentioned. *Ib.*

82. The city of San Francisco holds the municipal lands of the pueblo, not legally disposed of as hereinbefore explained; and her title is wholly unaffected by sheriff's sales under execution against her, so far as those sales touch or affect the aforesaid pueblo lands. *Ib.*

83. A defendant in ejectment, holding such lands merely by possession, may set up the invalidity of such sales, or the plaintiff's title derived therefrom, to defeat the plaintiff's action. *Ib.*

84. It is not clear that the order of the board of supervisors of the city and county of San Francisco, repealing the Van Ness ordinance, before the passage of the act of 1858 confirming it, destroyed the power of the legislature to give due effect to the provisions of that ordinance. *Ib.*

85. Assuming that this repealing order was effectual to defeat the rights claimed to have vested under the ordinance, then the property claimed would belong to the city, and plaintiff here could not recover. *Ib.*

86. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition, either precedent or subsequent, annexed to the grant. *Holladay* v. *Frisbie*, 15 Cal. 634; *Wheeler* v. *Miller*, 16 Cal. 125.

87. Nor does the proviso create a trust in the city in favor of the State, so far as the property itself is concerned; that is to say, the estate granted is not, by force of the proviso, held in trust partly for the benefit of the State. The interest of the city in the property is a legal estate for ninety-nine years. When the property is once sold or disposed of by the city, it is not charged with the payment of the per centage in the hands of the grantee or purchaser. This is a duty devolving on the city, with which the grantee or purchaser has no concern. *Ib.*

88. If there be any trust created by the proviso, it is only a trust in the one-fourth of the proceeds which the city may receive, amounting only to a covenant on the part of the city, which in no wise qualifies the grant or affects the legal estate of the city in the premises. *Ib.*

89. The beach and water lot property mentioned in the act is not devoted by the grant of the State to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is a leviable interest, subject to sale under execution. *Ib.* 635.

90. The proviso to the act operates only as a covenant on the part of the city, that if she make any sale or other disposition of the property, and realize from such sale

or other disposition any moneys, twenty-five per cent. of the same shall be paid into the State treasury. On the other hand, if the property be disposed of without the receipt of any moneys by the city, no obligation arises in favor of the State. *Ib.*

91. *Smith* v. *Morse*, 2 Cal. 524, deciding that the city's interest in this beach and water lot property can be sold on execution against the city, not to be disturbed; but any rights which "the commissioners of the funded debt of the city of San Francisco," under the act of May 1st, 1851, may possess in this property, are not passed on. *Ib.* 636.

92. Whatever interest the city of San Francisco, as defined by the charter of 1851, had in her beach and water lot property, on the first day of January, 1855, was transferred to and vested in the parties who were in the actual possession thereof on that day—provided their possession was continued up to June 20th, 1855, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process—by virtue of the Van Ness ordinance and the act of March 11th, 1858, ratifying and confirming the same; and such parties can defeat the claim of plaintiff, who holds under a conveyance by the president and two members of the board of land commissioners, created by act of May 18th, 1853, providing for the sale of the State's interest in the property within the water line front, as defined by the act of March 26th, 1851. *Ib.* 637.

93. The interest of plaintiff derived from a conveyance of the commissioners under the act of May 18th, 1853, is only to the reversion after the ninety-nine years designated in the act of March 26th, 1851. *Ib.*

94. A purchaser of beach and water lot property at sheriff's sale, in August, 1851, on execution issued upon a judgment recovered in January, 1851, against the city of San Francisco, acquired a title if the judgment became a lien upon the property sold previous to the act of May 1st, 1851, and the conveyance from the commissioners of the sinking fund to the commissioners of the funded debt. *Wheeler* v. *Miller*, 16 Cal. 125.

95. In this case, as the record does not show that the judgment ever became such lien, the decision giving title to the purchaser must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. *Ib.*

96. A grant by an alcalde of a town lot in San Francisco, after the conquest and cession of California, down to the incorporation of the city in April, 1850, will be presumed, until the contrary be shown, to be within the authority of such alcalde, and the lot granted will be presumed to be within the limits of the pueblo. *Payne* v. *Treadwell*, 16 Cal. 226.

97. The powers and authority which had been conferred by law upon municipal officers of the pueblo to grant pueblo lands were not suspended, ipso facto, by the war with Mexico or by the conquest, and the fact that such officers during the military occupation, and after the complete conquest and cession, were Americans, or held their office under American authority, did not change the powers and obligations which by the existing laws of the country belonged to such municipal officer. And the same presumptions attach to their grants of lots whether made before or after the conquest and cession. *Ib.*

98. The question of the boundary lines of the pueblo should not be left to the jury to be determined by parol proof. *Ib.* 228.

99. The center of the old presidio square is the initial point for a survey of the four square leagues to which the pueblo is entitled, and the survey is to be made, according to the ordinanzas de tierras y aguas, in all directions, *i. e.*, north, south, east and west, so as to include in all the four square leagues—making up for deficiencies in one direction (where these exist by reason of water being reached, etc.) by including the quantity thus deficient in another line or lines. *Ib.* 230.

100. According to these rules of measurement the fundo legal of the pueblo of San Francisco is bounded upon three sides by water; and hence the fourth line must be drawn for quantity east and west, straight across the peninsula, from the ocean to the bay. The four square leagues, exclusive of the military reserve, church buildings, etc.—constitute the municipal lands of the pueblo of San Francisco. *Ib.*

101. Where the land granted by an alcalde is shown to be within the limits of the four square leagues thus measured,

the presumption attaches that it was pueblo land, grantable as such, and that the alcalde grant passed the title to the grantee. This presumption might be repelled by proof of an express assignment of the lands of the pueblo, which did not include the land granted by the alcalde, or by proof that this was land reserved as a fort site, etc., or proof of an anterior or better title to the land by grant from some officer or body authorized to make it. *Ib.* 231.

102. A plaintiff suing for a lot in San Francisco may rest his case, prima facie, upon an alcalde grant in the usual form, and no further proof of title will be required than proof that the land granted is situated within the four square leagues, measured from the center of the presidio square in the manner directed by the ordinances. *Ib.*

103. San Francisco having been constituted by a public political act of the former government a pueblo, courts will take judicial notice of its existence, powers and rights, and among these last, its general boundary and jurisdiction. *Ib.*

104. Where land, within the general limits of the pueblo of San Francisco, and also within the limits of the old "Mission," was granted to an individual by the governor and departmental assembly, in 1839-'40, before the "Mission" had been entirely secularized, it would seem to have been at the date of the grant exempt from the exercise of pueblo rights over it, and it must be presumed to be grantable, just as any other land previously occupied by the mission establishments, but not exclusively dedicated to pious uses. *Brown* v. *City of San Francisco*, 16 Cal. 457.

105. The charter of 1851 of the city of San Francisco vested the legislative power of the city in a common council, consisting of a board of aldermen and a board of assistant aldermen, each composed of eight members, and provided that no ordinance or resolution should be passed unless by a majority of the members elected to each board. On the 5th of December, 1853, the mayor of the city approved of what purported to be an ordinance passed by the common council, providing for the sale of certain slip property of the city. This ordinance is designated in the official book of the city ordinances as ordinance No. 481. At the time the ordinance was presented to the board of aldermen, there was a vacancy in the board, occasioned by the resignation of one of its members, so that there were but seven members in office. Of these seven, four members voted for the ordinance and three against it: held, that the ordinance not having received a majority of the entire board—of the constituted members—was never passed, but was in fact rejected. *McCracken* v. *City of San Francisco*, 16 Cal. 616.

106. The alleged ordinance No. 481 authorized and required the mayor and joint committee on land claims of the city to sell the property specified at public auction to the highest bidder, at such time and place as they might think advisable, after not less than ten days' advertisement. The sale was advertised for December 26th, 1853. Within one hour previous to the sale the common council passed an ordinance, designated in the official book as ordinance No. 493, appropriating certain proceeds of the intended sale: held, that this recognition of the existence of ordinance No. 481, and the appropriation of a portion of the sale, did not constitute an adoption and approval of what had been previously done or might be subsequently done according to the terms of that ordinance, so as to give validity to the sale which took place. *Ib.*

107. The only authority the common council possessed to sell city property was derived from the thirteenth section of article three of the charter, and this section provides for the sale of property in one way only, to wit: by the passage of *laws*, which term is synonymous with ordinances, when applied to acts of municipal corporations. This mode of selling the property, having been pointed out by the charter, was restrictive—no other mode could be followed. *Ib.* 619.

108. The only way in which the common council could give validity to a sale was by passing a law directing it. Ordinance No. 493 does not purport to provide for any sale, but simply assumes that an ordinance ordering a sale had already passed; but this assumption could impart no vitality to the alleged ordinance No. 481. The common council could pass a law or ordinance only in one way, and that was by voting for it. *Ib.* 620.

109. The land directed by the terms of ordinance No. 481 to be sold, was set apart and dedicated as a public dock by

an ordinance passed in 1852, and while this dedicating ordinance remained in force, no sale could be legally had. In dedicating the land to public use, the common council exercised powers purely of a governmental nature, and not those of a mere property holder. It was by legislation that the dedication was made, and only by legislation could the public franchise be destroyed. *Ib.*

110. The distinction taken between the powers of a municipal corporation, when acting in its political and governmental character, and when acting with reference to its private property, has no application to the question involved in the case at bar. Its powers, whether regarded as political or governmental, or those of a mere private corporation, could be exercised only in conformity with the provisions of the charter. The legislature could impose such restrictions as it thought proper, and it saw fit to require the formalities of legislation for the disposition of the city property, as it did for the imposition of taxes, the regulation of the fire department, and matters connected with the general welfare of the city. *Ib.* 621.

111. *Holland* v. *City of San Francisco*, 7 Cal. 361; distinguishable from this case in this: that there, the fact that the property had been previously dedicated to public use as a public dock was not presented; but that case is not law, and is overruled, so far as it holds that ordinance No. 493 recognized and adopted ordinance No. 481, so as to render the subsequent sale valid and binding upon all parties. *Ib.*

112. Admitting that ordinance No. 493 did adopt and pass No. 481, it did so only within one hour previous to the sale. But this ordinance directs the sale upon ten days' previous advertisement. The authority to sell upon ten days' notice was not therefore pursued, and the sale without such notice was void. *Ib.* 622.

113. Ordinance No. 505 of the city of San Francisco, passed January 10th, 1854, by which the mayor and land committee were authorized to pay out of moneys in their hands, arising from the sale ordered by ordinance No. 481, the salaries of the members and officers of the police for the months of November and December of the previous year, does not ratify ordinance No. 481 because appropriating the proceeds of the sale. It assumes that ordinance No. 481 was valid, and there is nothing in the appropriation from which an intention to ratify can be implied. If the intention to ratify under some circumstances could be thus implied, the implication would be of no avail in the present case, as the common council were at the time laboring under the mistaken impression that ordinance No. 481 had become law. Ratification, to be effective, must be made with full knowledge of all the facts relating to the act ratified. To entitle any proceedings of the common council to the slightest consideration as evidence of ratification, it must be shown that those proceedings were taken with full knowledge that the ordinance had never passed, and that the sale thereunder was an absolute nullity. *Ib.* 625.

114. Inasmuch as by article six, section six, of the charter of San Francisco of 1851, the common council could authorize a sale of city property at public auction only, ratification of a previous sale is impossible. The object of the ratification is to vest in the previous purchaser the title; but at public auction there would be no certainty of this, for at the auction every one would be at liberty to bid, and the property would fall to the highest bidder. *Ib.* 626.

115. The city of San Francisco is not estopped from denying the sale made under ordinance No. 481, and asserting title to the property sold. The matters relied upon by way of estoppel, with the exception of ordinance No. 493, occurred after the sale, and could not have influenced the plaintiff in his purchase. Ordinance 493, directing an appropriation of a portion of the anticipated proceeds, was passed within one hour of the sale, and it nowhere appears that the same was ever brought to the notice of the plaintiff. Nor does it appear that there was any fraud or intention to deceive on the part of the common council. They acted, in passing ordinance No. 493, and in the subsequent use of the proceeds, upon the impression that a valid ordinance authorizing the sale had been passed. *Ib.* 627.

116. The doctrine of estoppel, as laid down in *Biddle Boggs* v. *Merced Mining Co.*, 14 Cal. 280, controls the question here. *Ib.*

117. Even if the city would be estopped

from denying the sale, and from asserting title to the property sold, it does not follow that the plaintiff would be estopped from claiming a return of the money he paid. The doctrine of estoppel in pais is applied to prevent a wrong-doer from asserting claims against his declarations or conduct, not to prevent an innocent party from enforcing his rights. It is the wrong-doer who is estopped, upon the principle that he shall not take advantage of his own wrong. *Ib.*

118. The sale of the city's property in this case being without authority and void, the plaintiff is not required to surrender possession of the property before he can maintain an action to recover back the purchase money. *Ib.*

119. The fifth section of article three of the charter of 1851 of the city of San Francisco, as to the city's not incurring debts beyond $50,000 under certain circumstances, is directory, and is not a limitation of the power of the common council as to the amount of debts and liabilities to be incurred. *Ib.* 628.

120. The section of the charter refers only to the acts or contracts of the city, and not to liabilities which the law may cast upon her. It was intended to restrain extravagant expenditures of the public moneys, not to justify the detention of the property of her citizens which she may have unlawfully obtained; and where, as in this case, plaintiff claims that the city has got his money without consideration—by mistake—and has appropriated it to municipal purposes, she is bound to refund; because the law—not her contract or permission—renders her liable. Her liability in this respect is independent of the restraining clauses of the charter; it arises from the obligation to do justice—to restore what belongs to others—which rests upon all persons, whether natural or artificial. *Ib.* 630.

121. The restriction contained in the fifth section of the charter can, in any view, only apply to liabilities dependent for their creation upon the volition of the common council, and hence does not include liabilities arising from torts, or trespasses, or mistakes. *Ib.* 631.

122. The sale of December 26th, 1853, under ordinance No. 481, being void, no title passed to the purchasers at that sale. The title to the property still exists in the city, except where deeds have since been taken under the acts of 1858 or 1860. The property remaining can at any time be taken possession or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert her title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money. *Ib.* 632.

SAN JOSE.

1. Under the charter of the city of San José, an ordinance abolishing the salary of the office of street commissioner and substituting fees thereof instead, is legal and binding on the officer. *Wilson* v. *City of San José*, 7 Cal. 276.

2. Our constitution provided that San José should be the capital of the State until changed by law and a two-third vote of the legislature. The people, at an election, selected Vallejo, which was made the capital by law, after which a majority of the legislature may remove the capital; and Sacramento having been made the capital in this manner, it is not illegal or unconstitutional. *People* v. *Bigler*, 5 Cal. 29.

SCHEDULE.

1. The schedules in insolvency must state the name of each creditor if known,* and if unknown, such fact must be stated. *McAllister* v. *Strode*, 7 Cal. 431.

2. Where an insolvent was liable on a note made by S. to him, and endorsed by him to R., and by him over to M., and describes the same in his schedule, "To R. I am contingently liable for one thousand

* The amendment of April 27th, 1860, to the insolvent law of 1851, discharges the debt, whether imperfectly described or not described at all.

dollars and interest, as endorser for one S. upon a promissory note, made and executed by said S. to said R.:" held, that the description was insufficient for inaccuracy, and that his discharge in insolvency is no bar to a recovery on the note. *Ib.*

3. Where an insolvent was liable on a note, and describes the same incorrectly in his schedule: held, that the description was insufficient for accuracy, and that his discharge in insolvency is no bar to a recovery on the note. *McAllister* v. *Strode*, 7 Cal. 431; *Judson* v. *Atwill*, 9 Cal. 478.

4. Where there is a misdescription of a note and a want of specification of the name of the real owner, or of any averment that his name is unknown, in the schedule of an insolvent, the proceedings in insolvency are no bar to a suit on the note, even if the insolvent did not know that the plaintiff was the real creditor. *Judson* v. *Atwill*, 9 Cal. 478.

5. If an insolvent does not know the name of the owner of notes executed by him, he must state this circumstance in the schedule. In the suit on the notes, the absence of such statement cannot be obviated by proof at the trial. *Ib.*

6. A defective statement in the schedule of an insolvent of certain promissory notes which constitute a portion of his debts and liabilities, does not invalidate the entire proceedings. If the statute as to the particularity with which debts and liabilities are required to be set forth by the insolvent is not substantially complied with, a creditor cannot be prejudiced by the decree of discharge in any suit which he may institute to enforce his claim. *Slade* v. *His Creditors*, 10 Cal. 485.

7. A note for five hundred dollars to the order of Alfred McCarty is insufficiently described in an insolvent's schedule, where he simply states "Alfred McCarty, borrowed money, April, 1855, five hundred dollars," and a discharge in such case is no bar to a suit on a note. *Mc Carty* v. *Christie*, 13 Cal. 81.

8. The want of a schedule of the property is sometimes regarded as a circumstance of fraud in the assignment, but the absence of a schedule has never, we believe, been held sufficient of itself to avoid a conveyance of this sort. *Forbes* v. *Scannell*, 13 Cal. 288.

SCHOOL LAND WARRANTS.

1. The act of May 3d, 1852, providing for the disposal of 500,000 acres of land, granted by Congress to this State, is not in conflict with the act of Congress of 1841, providing for the location after they are surveyed. *Nims* v. *Palmer*, 6 Cal. 13.

2. The State has the most perfect right to determine what shall constitute evidences of title as between her own citizens to all lands within her boundaries, and Congress has no power to interfere therein. *Ib.*

3. The fact of the appellants having objected, in the court below, to the introduction of evidence of location of a school land warrant, on the ground that it was not recorded in the proper office, is not sufficient to justify the appellate court in presuming that such was the case, when the statement on appeal contains no evidence of the fact. *Nims* v. *Johnson*, 7 Cal. 112.

4. The act of May 3, 1852, makes no reservation of mineral lands, and there is no prohibition against locating school land warrants on any of the mineral lands in the State. *Ib.* 113.

5. The object of the law requiring the record of entry on lands under school land warrants, was to give them notice to subsequent locators and settlers, and a failure to record it in the proper office will not make the location and entry void as to a subsequent locator with actual notice. *Watson* v. *Robey*, 9 Cal. 54.

SEAL.

1. A seal is sufficient when the impression is made upon the paper only, and not upon wax. *Connolly* v. *Goodwin*, 5 Cal. 221.

2. An impression upon paper constitutes a good seal, and this may be made as well by a pen as by a stamp; therefore a scrawl with the word seal written within it, or with the initials [L. S.], is sufficient. *Hastings* v. *Vaughn*, 5 Cal. 318.

3. The Mexican system knew nothing

of the common law doctrine of seals. A power of attorney executed while those laws were in force is therefore good without a seal. *Posten* v. *Rassette*, 5 Cal. 470.

4. A release of one joint debtor is a release of the others, but it must be a technical release under seal. *Armstrong* v. *Hayward*, 6 Cal. 186.

5. There is no particular sanctity about a sealed instrument which will estop a party from alleging fraud in the execution or in the obtaining of it.; on the contrary, fraud is a legitimate defense at all times and in all proceedings, at least under our system. *Hopkins* v. *Beard*, 6 Cal. 665.*

6. A bill of sale not under seal is insufficient to convey a mining claim. *McCarron* v. *O'Connell*, 7 Cal. 153; *Clark* v. *McElroy*, 11 Cal. 169.

7. The law imports a consideration to a sealed instrument from its seal. At common law a want of consideration could not be pleaded to a suit on a sealed instrument, the presumption of a consideration being absolute and conclusive. The statute of this State has not altered the presumption of a consideration which still accompanies the instrument, but only modified the rule so far as to allow it to be rebutted in the answer. *McCarty* v. *Beach*, 10 Cal. 463.

8. The objection to the want of a seal to a Mexican conveyance is not tenable. No seal was requisite under the civil law. *Stanley* v. *Green*, 12 Cal. 166.

9. The old and unmeaning distinction between sealed and unsealed instruments is done away with by our statute, and the consideration of a sealed bond may be impeached by the obligor, in the same manner as a promissory note by the maker. *Comstock* v. *Breed*, 12 Cal. 288.

10. We know of no authority which holds that a conveyance of interest in land must necessarily be under seal, and if it were so at common law, it does not follow that it is so required by our statute. *Ingoldsby* v. *Juan*, 12 Cal. 577.

11. The difference between instruments sealed and unsealed is, at this day, a mere unmeaning and arbitrary distinction made by technical law, unsustained by reason. By the common law, the equitable title to realty may be conveyed by instrument not under seal, if otherwise sufficient; and this equitable title, accompanied by possession, is sufficient under our system to give the right of possession. *Ortman* v. *Dixon*, 13 Cal. 36.

12. Under our system, probably an action can be maintained upon any title, legal or equitable, or upon an instrument, sealed or unsealed, which entitles plaintiff to the possession of the property in dispute as against the defendant. *Ib.*

13. In instruments not under seal, or not required to be executed with any particular formality, it is not important in what form the obligation of the party executing as agent or principal is expressed, if from the whole instrument the true character of it can be gathered. *Haskell* v. *Cornish*, 13 Cal. 47.

14. Where no words appear in the body of an instrument expressive of the intent to make it a sealed instrument, it will not be such even though the characters [L. S.] are added to the signature. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 13 Cal. 231.

15. The omission in the record of a deed to make a copy of the seal, or some mark to indicate the seal, does not vitiate the record. It is sufficient if it appear from the record that the instrument copied is under seal; as, for instance, when the deed purports to be under seal and to be signed, sealed and delivered in the presence of the notary before whom it is acknowledged. *Smith* v. *Dall*, 13 Cal. 512.

16. The execution of an appeal bond, the delivery of it to the clerk, filing it among the papers with the affidavit, and the actual suspension of proceedings, is prima facie as sufficient proof of delivery if delivery is essential, as if the instrument were sealed. *Dore* v. *Covey*, 13 Cal. 510.

17. It is no objection to a bill of sale for a mining claim that it is not under seal, whatever may be the effect of it in evidence. *Jackson* v. *Feather River Water Co.*, 14 Cal. 22.

18. A certificate of acknowledgment to a deed, with the private seal of the notary, dated September 23d, 1852, is good under the statute then in force. *Stark* v. *Barrett*, 15 Cal. 372.

19. A certified copy of a deed from the county recorder's office, contained in the margin of the acknowledgment taken before a notary, and in the place where his seal is usually found, the words "no seal"

*The statute of 1860, p. 175, permits bills of sales of mining claims without seal to pass the title.

thus: [No Seal]— the conclusion of the acknowledgment being, "In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year," etc. The court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the notary's seal: held, that the court erred; that the words "no seal," instead of implying that there was no seal affixed, were a mere note by the recorder of the place of the notarial seal, which he probably had no means of copying. *Jones* v. *Martin*, 16 Cal. 166.

20. A recorder, in certifying to copies of deeds from his office, need not transcribe the notarial seal to the acknowledgment— the certificate of acknowledgment in this case stating that the notary did affix his seal. *Ib.*

21. If, as contended in this case, a judgment by default is void, because of the absence of the seal of the district court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, the district court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. *Logan* v. *Hillegass*, 16 Cal. 202.

22. The deed to plaintiff of the land bought being signed by the mayor of the city and sealed with the corporate seal— the mayor being the legal custodian of the seal and it being affixed by his authority— is sufficient to entitle the deed to be read in evidence, and a party relying upon it need not go behind the seal for the purpose of showing authority for its execution. The seal is prima facie evidence that it was affixed by proper authority, and the deed is prima facie sufficient to pass the title. *McCracken* v. *City of San Francisco*, 16 Cal. 638.

SEAMEN.

1. A British seaman, on board a British vessel, of which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seaman, sue for and recover his wages in a State court. *Pugh* v. *Gillan*, 1 Cal. 486.

2. Justices of the peace alone have power to try and commit deserted seamen under the acts of Congress, and commissioners of the United States courts can only arrest and commit for trial. *Ex parte Crandall*, 2 Cal. 144.

See ADMIRALTY.

SECURITY.

See PLEDGE, SURETY.

SEGREGATION.

1. Where the goods of a third party are mixed with the property or in the apparent possession of the judgment debtor, the sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay and refusal to deliver. *Daumiel* v. *Gorham*, 6 Cal. 44; *Taylor* v. *Seymour*, 6 Cal. 514.

2. Where the land sold under execution consisted of separate but adjoining tracts, but the sheriff and purchaser were ignorant of the subdivisions, and the defendant failed to inform the sheriff of the fact, or to direct a sale by parcels: held, that the sale of the land in gross was valid. *Smith* v. *Randall*, 6 Cal. 51.

3. Where A had a large quantity of flour stored in the warehouse of B, and sold a portion of it to C, and gave an order for the flour sold on B, who accepted the same and gave C in exchange a receipt for the same, and transferred it on his warehouse books to the account of C, but did not separate any specific portion from the flour of A as the property of B, and the whole was subsequently seized in an action against A: held, that the sheriff was not liable to C in the absence of seg-

regation of the flour, but that B was estopped by his receipt from denying his liability. *Adams* v. *Gorham*, 6 Cal. 71; *Goodwin* v. *Scannell*, 6 Cal. 543.

4. Where the plaintiff bought a certain amount of flour, being part of a large quantity on storage belonging to the vendor, and the plaintiff did not remove the flour purchased, not separate it from the remainder; but the vendor subsequently sold the remainder and more to other parties, who removed what they purchased, leaving on storage a less amount than had been purchased by plaintiff, which was afterwards attached in a suit against plaintiff's vendor: held, that the sale and removal of all the flour except that bought by plaintiff, was a segregation of plaintiff's flour, vesting in him a clear title at the time of the seizure. *Horr* v. *Barker*, 6 Cal. 496.

5. Nor can the claim of a subsequent purchaser of flour from the same vendor, taking an order on the same storekeeper, embarrass the plaintiff's claim, there being no flour in store to meet the order in favor of such subsequent purchaser. *Ib.*

6. And where the plaintiff's action in such case was brought for the value of the flour, against another party claiming the flour, who had seized the same, the fact that plaintiff claims a less quantity of flour than he is really entitled to does not operate otherwise than as a waiver of his claim to such additional quantity. *Ib.*

7. The doctrine of segregation is not applicable to a man's property alone, in an action against a trespasser, and having claimed damages for a less quantity of flour than was his, it cannot be objected that his action must fail for want of segregation of the flour for which he claims from that which he does not claim, though it is his. *Ib.*

8. Where the plaintiff took a mortgage on 1,000 sacks of flour, and took the warehouseman's receipt therefor, and subsequently requested him to segregate the particular flour from a large quantity belonging to the mortgagor, and the warehouseman accordingly put plaintiff's mark on a pile of 1,196 sacks of the mortgagor, standing separate from the rest: held, that it was a good segregation. *Squires* v. *Payne*, 6 Cal. 659.

9. Where the plaintiff bought eight hundred sacks of flour, on storage in a warehouse, which stood therein as a separate pile, the number of sacks of which was ascertained by counting the outside rows, and the number in the pile marked on one of the sacks, and it was thus delivered to the purchaser, who permitted it to remain in the same place, where it was several days afterward attached as the property of the vendor: held, that the delivery was sufficient and the sale valid. *Cartwright* v. *Phœnix*, 7 Cal. 282.

10. Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on the warehouseman, which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on his books charging the vendor and crediting the purchasers with their respective lots: held, that there was a sufficient delivery of possession without a separation of the various lots. *Horr* v. *Barker*, 8 Cal. 608.

11. Where the vendor only sells a part of goods on storage, those sold, if all together and of the same mark, must be separated from the larger mass in order to change the possession; but where all the goods of the vendor in the hands of a third party are sold, the change of possession is complete by delivery of the order, taking a new receipt and entry of the transaction on the books of the warehouseman. *Ib.*

12. The different purchasers have a right to leave the goods so by them purchased in one mass, subject to an apportionment between themselves of any loss. *Ib.* 609.

13. A delivery of a warehouse receipt, stating that the goods named therein are deliverable on return of the receipt, is sufficient prima facie to pass the title. There is no substantial difference in this respect between a warehouse receipt and a bill of lading. *Ib.* 613.

14. When the defendants show that the person to whom, in his own name, the receipt was given, and who passed it to plaintiff, was their agent or broker, acting for them, but permitted to keep it on storage in his own name, they do not rebut the prima facie case made out by the plaintiffs, by the possession of the receipt. *Ib.* 614.

15. Where a claim to a tract of land under a Mexican grant, somewhere within a certain larger tract, was ascertained and the land segregated by a survey, under a decree of confirmation by the United States supreme court: held, that the land became immediately taxable, and that an assessment thereof will be presumed to have been made after the survey, when the time allowed by law for the assessment extended to a day four days after the survey. *Palmer* v. *Boling*, 8 Cal. 388.

16. When A has six hundred barrels of flour on storage, and he sells to B one hundred, to C two hundred, and to D three hundred, and gives each a delivery order upon his warehouseman, and the purchasers all surrender their several orders to the warehouseman without making any separation of each lot from the common mass, but voluntarily leave the flour standing on the books of the warehouseman to the credit of each purchaser, for his proper number of barrels, it is a complete delivery to each purchaser and will pass the title to each. *Horr* v. *Barker*, 11 Cal. 403.

17. The separation by the purchasers of their various lots is a mere matter of convenience among themselves, not affecting their rights as to their vendor or a mere trespasser. *Ib.* 403.

18. A safe in the possession of McC. belonging to W. F. & Co., for whom, as also for plaintiff, he was agent, contained $6,000 in coin. Of this sum four hundred dollars belonged to W. F. & Co., the balance to plaintiff. Defendant, as sheriff, under a writ against McC., seized $1,800 of the money in the safe as his property and put it in a bag. Plaintiff then claimed the money as his, McC. being present and not objecting: held, that this amounted to a segregation of the $1,800 from the mass of coin in the safe so as to replevin by plaintiff. *Griffith* v. *Bogardus*, 14 Cal. 412.

See DELIVERY, SALE, STATUTE OF FRAUDS.

SENTENCE.

1. When judgment of death has been rendered against a prisoner by the court of first instance, it was reversed by the supreme court, as well on the ground that it has no jurisdiction to pass sentence of death, as that numerous errors and irregularities appeared to have occurred at the trial, and in the proceedings. *People* v. *Daniels*, 1 Cal. 107.

2. It is no error for a court in a criminal case to set a day for pronouncing sentence in the absence of the prisoner. It is only requisite that he should be present when the sentence is pronounced. *People* v. *Galvin*, 9 Cal. 116.

3. After sentencing the prisoner, but before signing final judgment, the court had the prisoner brought before it, and amended the sentence by shortening the time: it was held not to be error. *People* v. *Thompson*, 4 Cal. 240.

See CRIMES AND CRIMINAL LAW.

SESSIONS, COURT OF.

1. By the judiciary act of March 11th, 1851, the courts of sessions are vested with the power of taxation and appropriation for county purposes.* *Thompson* v. *Rowe*, 2 Cal. 70.

2. No appeal lies from a judgment of a district court on an appeal from an order of the court of sessions† upon an application for a ferry license. *Webb* v. *Hanson*, 2 Cal. 134.

3. When the justices of the peace fail to elect from their number associate justices of the court of sessions on the first Monday in October, the county judge may appoint associates for the term, but the justices may convene at a subsequent time and select associates. *People* v. *Campbell*, 2 Cal. 137.

4. On an election by justices of the peace for associate justices of the court of sessions, the county judge and clerk are ex officio officers of this convention, but they have no authority other than that of presiding over and recording its proceedings,

*This power, as conferred, declared unconstitutional in *Burgoyne* v. *Supervisors of San Francisco County*, 5 Cal. 20.

†The appellate jurisdiction of the district declared unconstitutional in *People* v. *Peralta*, 3 Cal. 379.

and the dissolution of the convention by the county judge is illegal. *Ib.*

5. The act of March 18th, 1850, grants an appeal to the district court from the court of sessions* in the matter of a license to establish a ferry, but does not provide for an appeal from the judgment of the district court, which is therefore final and conclusive. *Webb* v. *Hanson*, 3 Cal. 68, 105.

6. There can be no appeal from the court of sessions to the district court. *People* v. *Peralta*, 3 Cal. 379.

7. The legislature possessed an undoubted right to transfer the criminal business of the court of sessions to the district court. *People* v. *Gilmore*, 5 Cal. 380.

8. All other than judicial functions conferred upon the courts of sessions or its officers are unconstitutional and void. *Burgoyne* v. *Supervisors of San Francisco County*, 5 Cal. 20, 22; *Phelan* v. *Supervisors of San Francisco County*, 6 Cal. 540; *Hardenburgh* v. *Kidd*, 10 Cal. 403.

9. Justices are not regarded by the constitution as supernumeraries to the court of sessions; they must, as necessary officers, begin with and continue through the trial. *People* v. *Ah Chung*, 5 Cal. 105; *People* v. *Barbour*, 9 Cal. 234.

10. The court of sessions has no appellate jurisdiction in either civil or criminal cases. Its jurisdiction is original, not appellate. *People* v. *Fowler*, 9 Cal. 87.

11. Where the sheriff as ex officio tax collector received taxes, and afterwards, on being sued therefor, denied the right of the county to recover the same from him, because the same had been illegally levied by the court of sessions: held, that although the court of sessions had no power to levy taxes, yet the defendant being the agent or trustee of the county, was estopped from denying the right of the county to recover. *Placer County* v. *Astin*, 8 Cal. 305.

12. It was the intention of the legislature, by the twenty-fifth section of the act creating a board of supervisors throughout the State, to transfer from the courts of sessions to the board of supervisors the general and special powers and duties of a civil character which had, before the passage of the act, been vested in such court. *People* v. *Bircham*, 12 Cal. 54.

13. An indictment for grand larceny found at a special term of the court of sessions is valid. Under the statute authorizing that court to hold special terms in certain cases, the court, when specially called, has the same powers as at a regular term. *People* v. *Carabin*, 14 Cal. 439.

14. An indictment in the court of sessions in San Francisco may be entitled either as of the county of San Francisco or as of the city and county of San Francisco. *People* v. *Beatty*, 14 Cal. 572; see *People* v. *Mullins*, 10 Cal. 20.

15. Fighting a duel with a fatal result is not murder within our statutes, but a special offense under the act of 1855. Over such offense courts of sessions* have jurisdiction. *People* v. *Bartlett*, 14 Cal. 653.

16. Where the convention of justices of the peace, for electing two associate justices of the court of sessions, was presided over by the then acting county judge, his official acts at such convention were legal and valid—although it was afterwards determined that another person had been legally elected to that office; and a court of sessions, composed of said other person as county judge, and of the two associates elected by such convention, was legally organized. *People* v. *Wyman*, 15 Cal. 74.

17. On an indictment for murder the court of sessions is not bound to assign counsel for prisoner in empanneling the grand jury. *People* v. *Moice*, 15 Cal. 331.

18. Indictment and trial in the court of sessions in the city and county of San Francisco, for larceny, charged to have been committed within said city and county. The evidence tended to show that the offense was there committed, and the verdict was "guilty as charged in the indictment:" held, that the verdict was conclusive as to the offense being committed within the jurisdiction of said court. *People* v. *Magallones*, 15 Cal. 428.

19. It is no objection to an indictment found in said court of sessions, that an assistant prosecuting district attorney was present during the session of the grand jury, while the charge embraced in the indictment was under consideration. *Ib.*

20. It is irregular for one of the justices

*The appellate jurisdiction of the district court declared to be unconstitutional in *People* v. *Peralta*, 3 Cal. 379.

*The statute of 1860, page 31, amendatory of the criminal law vests the jurisdiction in the district courts.

composing the court of sessions, on a criminal trial, to retire before the termination of the trial, and another justice, not present during the previous stages of it, to come in and participate in the proceedings. The members of the court who act as such when the case is developed, should continue to act until the close. Whether such irregularity is sufficient to reverse a conviction otherwise regular, not here decided—but the practice is dangerous and disapproved of. *People* v. *Eckert*, 16 Cal. 113.

SET-OFF.

See COUNTER CLAIM.

SETTLERS.

1. The provision of the "settlers' act" of 1856, requiring the party recovering in ejectment to pay the defendant the value of his improvements, it seems is not in violation of the provision of the federal constitution, prohibiting States from passing laws impairing the obligation of contracts. All questions of property are within the jurisdiction of the respective States, and the individual members thereof in forming a government are not considered as contractors with such government, in the sense employed in the constitution of the United States. *Billings* v. *Hall*, 7 Cal. 6.

2. The settlers' act of 1856 does not discriminate between an innocent and a tortious possession, nor is it a mere attempt to avoid certainty of action by providing for an equitable adjustment of the whole subject in one suit. By its terms it applies to past as well as present cases. It takes from a party that which before was his; for if he refuses to pay for improvements put on his land, against his will, by a trespasser, he loses not only the improvements but the land itself. Such legislation is repugnant to morality and justice, and in violation of the letter and spirit of the constitution. *Billings* v. *Hall*, 7 Cal. 9; *Welch* v. *Sullivan*, 8 Cal. 187.

3. Those who have settled in good faith upon lands, believing them to belong to the United States, without notice of an adverse title, ought to be protected; in fact, they are protected by the rules of law and equity. *Welch* v. *Sullivan*, 8 Cal. 202.

4. The eleventh section of the act of 1856, for the protection of actual settlers and to quiet land titles, only applies to actions brought to recover the possession of lands after the issuance of a patent. *Morton* v. *Folger*, 15 Cal. 208.

See LANDS, MINES AND MINING, II.

SHERIFF.

I. IN GENERAL.

1. After the process of the court is finally and completely executed, from that moment the power of the sheriff under it and the authority of the court to enforce it, ceased. *Loring* v. *Illsley*, 1 Cal. 28.

2. Where an order of court directed the sheriff to seize certain specific property, and this property proved not to belong to the defendant in the suit, the sheriff was held liable to the owner. *Rhodes* v. *Patterson*, 3 Cal. 470.

3. The time provided by the statute in which a jury shall be returned by the sheriff is directory, and not mandatory. *Mowry* v. *Starbuck*, 4 Cal. 275.

4. The testimony of the sheriff is competent to disclose what transpires in the jury room. *Wilson* v. *Berryman*, 5 Cal. 46.

5. The statute penalties against sheriffs for the nonpayment of moneys collected on execution are only receivable where the sheriff, by his own return, admits the

collection of the money, but refuses to pay it over. *Egery* v. *Buchanan*, 5 Cal. 56.

6. In an action of trespass against the sheriff, where he is declared against personally and not as sheriff, it is competent to prove that the defendant was sheriff, and that his deputy, as such, committed the trespass. *Poinsett* v. *Taylor*, 6 Cal. 79.

7. In such a case it is not necessary to prove that the defendant directed his deputy to seize the particular property in question in order to hold the defendant liable. *Ib.*

8. Where the sheriff wrongfully took possession of the goods, and thereby deprived the plaintiff of them, the fact that they were taken by the coroner, under a writ against the sheriff, before the latter had removed them, does not excuse his tort. *Squires* v. *Payne*, 6 Cal. 659.

9. Statutory penalties against a sheriff are only recoverable when by the return of the sheriff he admits the collection of the money, and refuses to pay it over, and not where his failure to pay over arises from his inability to decide between conflicting claims of different execution creditors. *Johnson* v. *Gorham*, 6 Cal. 196.

10. Where A had a large quantity of flour stored in the warehouse of B, and sold a portion of it to C, and gave an order for the flour sold on B, who accepted the same, and gave C in exchange a receipt for the same, and transferred it on the warehouse books to the account of C, but did not separate any specific portion from the flour of A as the property of B, and the whole was subsequently seized in an action against A: held, that the sheriff was not liable to C in the absence of segregation of the flour, but that B was estopped by his receipt from denying his liability. *Adams* v. *Gorham*, 6 Cal. 71; *Goodwin* v. *Scannell*, 6 Cal. 543.

11. Where the defendant, as sheriff, collects money on attachment more than sufficient to satisfy the attaching creditor, and after the expiration of his term of office, another attaching creditor attaches the surplus and seeks to make the sheriff liable therefor on his official bond: held, that the demurrer to the complaint was properly sustained, as there was no relation between the defendant and plaintiff to render defendant officially liable. *Graham* v. *Endicott*, 7 Cal. 146.

12. Where power is given to sue, authority exists to give an indemnity bond to the sheriff to retain property seized under attachment, it is an instrument necessary to carry the power to sue into effect. *Davidson* v. *Dallas*, 8 Cal. 258.

13. The application of an attaching creditor to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given by the party moving to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them. *Dixey* v. *Pollock*, 8 Cal. 573.

14. Where the sheriff as ex officio tax collector received taxes, and afterwards on being sued therefor, denied the right of the county to recover the same from him, because the same had been illegally levied by the court of sessions: held, that although the court of sessions had no power to levy taxes, yet the defendant being the agent or trustee of the county, was estopped from denying the right of the county to recover. *Placer County* v. *Astin*, 8 Cal. 305.

15. It is not necessary in an action against a sheriff to recover damages (in addition to the two hundred dollars imposed by law as a penalty) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit. *Pearkes* v. *Freer*, 9 Cal. 642.

16. Where a writ of restitution has been awarded, and the sheriff refuses to execute the same, on the ground that the mine is in possession of certain persons not parties to the suit, who claim to hold under the corporation, the court will award a peremptory mandamus against the sheriff to compel him to execute the writ. *Fremont* v. *Crippen*, 10 Cal. 215.

17. In an action against a sheriff for wrongfully seizing and selling property under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure; the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. *Phelps* v. *Owen*, 11 Cal. 23.

18. In the service of process the sheriff is responsible only for unreasonably or not reasonably executing it. He is not bound to start on the instant of receiving a writ

to execute it, without regard to anything else. *Whitney* v. *Butterfield*, 13 Cal. 338.

19. Reasonable diligence in the execution of process depends upon the particular facts; whether, for instance, the writ be for fraud, or because defendant is about to leave the State, or remove his property, and the like. *Ib.*

20. A writ placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. *Ib.*

21. Where an indemnity bond is given to a sheriff to hold him harmless and pay any judgment which may be rendered against him, by reason of his seizure of certain property, his remedy at law on the bond is clear, for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not, and a bill in equity will not lie. *White* v. *Fratt*, 13 Cal. 524.

22. A bond given voluntarily to the sheriff on delivery of the property attached is valid at common law. *Palmer* v. *Vance*, 13 Cal. 557.

23. Where a redemptioner under the statute pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. *McMillan* v. *Vischer*, 14 Cal. 240.

24. In such case the sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptionee. *Ib.* 241.

25. *Davidson* v. *Dallas*, 8 Cal. 277, commented on, and doubted, and the opinion intimated that the bonds in question were independent securities for the same object of holding the sheriff harmless in respect to the same act of retaining the vessel, and that they amount to an undertaking on his part to detain and hold the vessel, at the request of each of the creditors, Gilsen and Dallas, and to a separate covenant by each of these obligors, in consideration of this agreement, to see him harmless from any consequences arising from such detention. The question, therefore, is left open for review. *Davidson* v. *Dallas*, 15 Cal. 78.

26. In an action against a sheriff for seizing and selling certain personal property, alleged to belong to plaintiff, under an execution against one Teal, it being averred in the answer that the property belonged to Teal: held, that evidence tending to prove that it was the partnership property of Teal and plaintiff was proper, and that if they were partners, and as such owned the property, plaintiff could not recover. *Hughes* v. *Boring*, 16 Cal. 82.

27. Under the act of 1857, Ch. 236, regulating fees of office in certain counties, the sheriff may charge fees for copies of the summons and injunction served by him in a suit, though the copies were prepared and printed by the plaintiff, and certified by the clerk at the plaintiff's request; but the sheriff must look for his fees to plaintiff, at whose request the copies were served, and cannot sue the clerk for money had and received—although plaintiff had paid the clerk for such copies—unless the money was delivered to him to be paid to the sheriff. *Edmondson* v. *Mason*, 16 Cal. 388.

II. The Office of Sheriff.

28. Where it appeared that the claimant of the office had acted as sheriff, that being the office in controversy, that fact, together with the certificate of election, would raise the presumption that he had executed his bond and taken the oath of office. *People* v. *Clingan*, 5 Cal. 390.

29. A sheriff is a ministerial or executive officer solely, but there is no constitutional prohibition against his exercising the duties of tax collector, where the law consolidating the two offices was passed prior to his election. *Merrill* v. *Gorham*, 6 Cal. 43; *People* v. *Squires*, 14 Cal. 15.

30. Strictly speaking, there can be no vacancy in the office of sheriff caused by the death, removal or resignation of the incumbent; for upon the happening of such an event, the coroner by operation of law becomes sheriff. *People* v. *Phoenix*, 6 Cal. 93.

31. The coroner only holds the office of sheriff ex officio until the appointment of a new sheriff by the board of supervisors. *Ib.*

32. Though the appointment of a sheriff by a county judge be void, yet the acts of such sheriff as a de facto officer are good. *People* v. *Roberts*, 6 Cal. 215.

33. In an action by one claiming to have been elected sheriff against his predecessor, to compel a surrender of the books, papers, etc., belonging to the office, plaintiff must show prima facie that a vacancy existed in the office, and that he was elected to fill it. *Doane* v. *Scannell*, 7 Cal. 395.

34. The defendant being elected sheriff of the county of San Francisco in September, 1855, on July 26th, 1856, and after the consolidation act went into effect, one of the defendant's sureties applied to the county judge to be released from further liability; on the sixth of August the judge declared the office vacant by reason of the failure of defendant to file new bonds: held, that the county judge had no jurisdiction, the new law then in force vesting the power of approving the bonds of such officer in the county judge, auditor, and president of the board of supervisors. *People* v. *Scannell*, 7 Cal. 438.

35. In the construction of the act of April 29th, 1857, repealing the then existing law concerning ex-sheriffs as tax collectors, and requiring them to turn over the assessment rolls to their successors, taken in connection with the act of April 30th, excepting certain counties from the operation of the repealing law of the day previous, the supplementary statute must be taken as part of the repealing statute, and construed as passed at the same time. *Manlove* v. *White*, 8 Cal. 377.

36. On the election of a new sheriff the former sheriff must complete the execution of all final process which he had begun to execute before the expiration of his term of office. *People* v. *Boring*, 8 Cal. 407.

37. The duties of sheriff, as such, are more or less connected with the administration of justice; they have no relation to the collection of the revenue. *People* v. *Edwards*, 9 Cal. 292; *People* v. *Squires*, 14 Cal. 16.

38. A motion against a sheriff and his sureties, under the provision of the ninth section of the "act concerning sheriffs," passed April 29th, 1851, is a summary proceeding in derogation of the rules of the common law, and is penal in its character, and for these reasons the act must be strictly construed. *Wilson* v. *Broder*, 10 Cal. 488.

39. The remedy by motion against a sheriff and his sureties, to compel them to pay over money collected on execution, was only given for cases of intentional delinquency on the part of the sheriff, as a punishment for his willful or corrupt neglect of duty, and was not designated to embrace a case in which he declined to pay over money collected under circumstances of a bona fide, well grounded doubt of the authority of the party to demand it. *Ib.* 489.

40. A sheriff cannot maintain an action against a county for compensation for "taking care of the court house and keeping and guarding the jail of the county during his incumbency of the office of sheriff." The law fixes his compensation for the performance of such official duty. *Stockton* v. *Shasta County*, 11 Cal. 114.

41. A sheriff, whose term of office has expired, has no right to collect the State and county tax, as unfinished business from the assessment list which came into his hands while in office. *Fremont* v. *Boling*, 11 Cal. 389.

42. The taxes of 1855, after March, 1856, are not of the unfinished business of the outgoing sheriff, for the reason that after the settlement of the sheriff with the county auditor in March, the delinquent taxes of that year are transferred to the tax list of the succeeding year, and it is made the duty of the then sheriff to proceed to collect such delinquent tax as other taxes. *Ib.*

43. There is no irreconcilable conflict between the amendatory act of 1853, and the revenue acts of 1853 and 1854. The provision that the sheriff going out of office shall continue to collect the taxes coming to his hands before his term expired, was intended to provide for the period intervening between October and March, the time of his settlement. *Ib.* 390.

44. The sheriff being ex officio tax collector of foreign miners' licenses, by an act of the legislature may be deprived of the office of tax collector before the expiration of term. *People* v. *Squires*, 14 Cal. 16.

45. The sheriff and his deputy are one person in law, so far as to make the former responsible for the acts of the latter, but not so far as to require of the sheriff impossibilities or to impose unconscionable exactions. *Whitney* v. *Butterfield*, 13 Cal. 342.

See ELECTION, OFFICE, VACANCY.

1. *The Sheriff's Bond.*

46. The consolidation act of San Francisco gave the officers named therein two days after the meeting of the board of supervisors in which to file new bonds. The meeting took place on the ninth of July, and the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane* v. *Scannell*, 7 Cal. 395; *People* v. *Scannell*, 7 Cal. 436.

47. A defect in the approval of a sheriff's bond cannot be set up as a defense in an action on said bond against the sureties. *People* v. *Edwards*, 9 Cal. 292.

48. The revenue act of 1854 made the sheriff ex officio tax collector, and provided that he should be liable on his bond for the discharge of his duties in the collection of taxes. No other bond is required by law of the sheriff, except when he acts as collector of foreign miner's licenses: held, that the bond in suit entered into in 1856 must be deemed to have been executed in view of the provisions of the revenue act, and that all delinquencies in the collection of taxes except foreign miners' licenses are covered by the bond. *Ib.*

49. When the obligors in a sheriff's bond bind themselves jointly and severally in specific sums designated, they may all be joined in the same action; but separate judgments are required. *Ib.* 293.

50. Plaintiff sued out an attachment against K., and the sheriff levied it on certain goods. Other creditors issued attachments, which were levied by the sheriff on the same goods. Plaintiff then dismissed his attachment, and sued the sheriff in replevin, claiming that K. obtained a portion of the goods of plaintiff by fraud. Instead of taking the goods out of the sheriff's possession, plaintiff made an arrangement with the sheriff, whereby he agreed to sell the goods, and keep the proceeds to answer any judgment plaintiff might obtain in his replevin suit. Sheriff sold the goods, paid the money into court, saying nothing about this arrangement, and the money was paid, by order of court, on the claims of the other creditors. The sureties of the sheriff had nothing to do with, and gave no sanction to the arrangement. Plaintiff had judgment in replevin: held, that the sureties on the sheriff's official bond are not liable to plaintiff for the goods or the money received from the sale—this agreement between him and plaintiff being no part of the sheriff's official duty; that the sheriff, as such, had no legal authority to sell these goods and to hold the money on bailment for plaintiff; and that, in so far as plaintiff trusted the sheriff with goods, and authorized him to sell them, he became the agent of plaintiff, and must be looked to as such. *Schloss* v. *White*, 16 Cal. 68.

51. Sureties on the sheriff's official bond in this State stipulate for his official, not his personal dealings, and are entitled to stand on the precise terms of their contract. *Ib.* 69.

See BOND, II.

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2. *The Elizor.*

52. The appointment of an elizor as a substitute sheriff by a judge having competent jurisdiction, the presumption of law is that he faithfully performed his duty. *Turner* v. *Billagram*, 2 Cal. 522.

53. In the event of the disqualification of the sheriff or coroner, a district court has the right to appoint an elizor, not only by statute but by virtue of its original jurisdiction. *Wilson* v. *Roach*, 4 Cal. 367.

54. In trespass against the sheriff, the court below, on plaintiff's motion, may order a special jury to try the case instead of the regular panel. The sheriff being interested ought not to summon a jury, and there being no coroner, an elizor may be appointed to summon the jury. *Pacheco* v. *Hunsacker*, 14 Cal. 124.

III. THE RETURN.

55. Where the place where the summons was served was not stated, but it was directed to the sheriff of San Francisco, and was returned by him served, the court should have assumed that it was served within his jurisdiction. *Crane* v. *Brannan*, 3 Cal. 195.

56. A sheriff's return is not traversable, and a court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and

collusion. *Egery* v. *Buchanan*, 5 Cal. 56.

57. Where a sheriff fails to pay over money collected on execution, the action should be for a false return. *Ib.*

58. Courts cannot know an under officer, and the act and return of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal. *Joyce* v. *Joyce*, 5 Cal. 449.

59. The term "appurtenances," used in the return of a levy by a sheriff, is too general, vague and indefinite to comprehend in its meaning any personal property as the subject of the levy; nothing, therefore, is passed by the sale. *Monroe* v. *Thomas*, 5 Cal. 471.

60. A sheriff has no right after making a return to amend it so as to affect rights which have already vested. *Newhall* v. *Provost*, 6 Cal. 87; *Webster* v. *Haworth*, 8 Cal. 26.

61. A description in a sheriff's return of city lots, by numbers, referring to the official city map, is sufficient. *Welch* v. *Sullivan*, 8 Cal. 186.

62. The return of an attachment cannot be amended by the sheriff so as to postpone the rights of creditors attaching subsequently, but before the correction. *Webster* v. *Haworth*, 8 Cal. 26.

63. The lien of an attaching creditor cannot be divested by the failure of the sheriff to make a proper return of the writ, and it is not necessary where the levy is made by posting a copy of the writ on the premises, that the return of the sheriff should show that the premises were at the time unoccupied. *Ritter* v. *Scannell*, 11 Cal. 248.

64. A mistake in the date of the sheriff's return may be corrected at any time. *Ib.* 249.

65. The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud* v. *El Dorado County*, 12 Cal. 133.

66. Where the return of a sheriff states that he served defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the clerk, and not by some one else. *Curtis* v. *Herrick*, 14 Cal. 119.

67. A defendant having no defense to an action cannot go into equity and enjoin a judgment by default on the ground that the sheriff's return of service on him is false, and that in fact he had no notice of the proceeding. *Gregory* v. *Ford*, 14 Cal. 141.

See RETURN.

IV. THE LEVY.

68. If the master of a vessel be a part owner, his interest in the vessel may be levied on and sold, but his agency as master will be in no wise affected. *Loring* v. *Illsley*, 1 Cal. 31.

69. A being indebted to B, delivered to him merchandise as security for his debt, which he was to sell, and apply the proceeds to its payment. A sheriff levied upon the property as belonging to A: held, that the merchandise was not subject to seizure under an execution against A, without first paying the debt of B. *Swanston* v. *Sublette*, 1 Cal. 124.

70. A sheriff who levies an attachment by virtue of the process of the court, has not the right of property in the debt, and cannot maintain an action in his own name for the recovery of the debt. *Sublette* v. *Melhado*, 1 Cal. 105.

71. By the statute of 1850, personal property levied on by the sheriff must be actually seized and sold in presence of the purchaser. *Smith* v. *Morse*, 2 Cal. 556.

72. The assent of an ordinary agent, who had general charge of his principal's affairs during his temporary absence, will not justify the sheriff who holds an execution against a third person in levying upon property in the possession of the principal in her absence. *Fitch* v. *Brockman*, 2 Cal. 578.

73. Money in the hands of a sheriff, collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly disposed of, and is not the subject of attachment or garnishment, nor can the sheriff attach money, collected on execution, in his own hands. *Clymer* v. *Willis*, 3 Cal. 363.

74. A sheriff, on the request of defendant, may levy on real estate, though there be personal property present amply sufficient to satisfy the execution. *Smith* v. *Randall*, 6 Cal. 50.

75. In an action against a sheriff for refusing to levy an attachment on certain

property as belonging to the attachment debtor, testimony that the property had been claimed by a third party, and the right of property tried before a sheriff's jury, and decided in favor of claimant, is irrelevant and inadmissible, when those facts have not been set up as new matter of defense in the answer. *Strong* v. *Patterson*, 6 Cal. 157.

76. An officer who seizes property in the hands of the debtor may justify under the execution or process, but when he takes property from a third person, who claims to be the owner thereof, on execution, he must show the execution; if on attachment, the writ of attachment; and, as we think, the proceedings on which it was based. *Thornburg* v. *Hand*, 7 Cal. 561.

77. The owner of property attached or levied upon as the property of another is not conclusively estopped from showing title in himself because he has given an accountable receipt for its delivery to the officer, although the receipt admits that the property is attached or levied upon as the property of the debtor, if he makes known to the officer his claim at or before the time the receipt is given. *Bleven* v. *Freer*, 10 Cal. 177.

78. An officer, in order to justify the seizure of property in the possession of a stranger to the writ, which he has executed, must plead specially such justification. He cannot justify under a general denial of the allegations of the complaint. *Glazer* v. *Clift*, 10 Cal. 304.

79. The presumptions are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached is sufficient prima facie to show a due and proper execution of the writ. *Ritter* v. *Scannell*, 11 Cal. 248.

80. T. commenced suit against I. by attachment; the writ was levied upon certain personal property by the plaintiff, H., as sheriff. M. I., wife of I., claimed the property, and brought her action of replevin under the code, which action was decided in favor of the sheriff. Other creditors attached the same property, which the sheriff sold and paid the proceeds into court. In an action on the replevin bond it was held that T. had a lien by attachment upon the goods, which continued even after the replevy by M. I. *Hunt* v. *Robinson*, 11 Cal. 272.

81. If the sheriff levies upon the property of a person not a party to the execution, he is responsible in an action at law. *Markley* v. *Rand*, 12 Cal. 277.

82. A deputy sheriff who seizes property under an attachment, is not authorized by virtue of his office to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. *Krum* v. *King*, 12 Cal. 413.

83. A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands except in due course of law, and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. *Sanford* v. *Boring*, 12 Cal. 541.

84. No parol instruction of the plaintiff in attachment or execution, respecting property seized by the sheriff under either writ, will discharge such sheriff from liability. The statute is express that such instructions must be in writing. *Ib.*

85. The evident meaning of the language of the act embraces all acts done by the sheriff in respect to the execution of process, including the care and disposition of the property levied upon. *Ib.* 542.

86. The mere fact that the judgment debtor (against whom execution had issued) was found upon the mining ground of plaintiff, did not justify the sheriff, who had the execution, in going on the ground and digging up the soil and taking the gold it contained. *Rowe* v. *Bradley*, 12 Cal. 230.

87. Plaintiff was surety on a contract for the payment of money, upon which judgment was obtained against all the parties, and execution was subsequently issued, and levied upon property of the principal sufficient to satisfy the same. After the levy, the sheriff, under the direction of the plaintiff in execution, took the principal's note for the amount of the judgment, and released the levy. Subsequently, a second execution was issued upon the judgment, and an attempt made to levy it on the property of plaintiff: held, that the release of the levy of the first execution and taking of the principal's note, discharged the surety. *Morley* v. *Dickenson*, 12 Cal. 563.

88. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders, and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all of its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale. *Crandall* v. *Blen*, 13 Cal. 23.

89. Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first writ, no special circumstances being shown. *Whitney* v. *Butterfield*, 13 Cal. 340.

90. The mere omission of a deputy to inform the sheriff of having process in hand, is not such negligence as to charge the sheriff in case a writ last in hand was executed first. *Ib.*

91. Where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. *White* v. *Fratt*, 13 Cal. 525.

92. In the case of conflict between the individual and firm creditors, equity has jurisdiction. No action lies against the sheriff for levying the execution of the individual creditor, and a sale to different purchasers might result in a loss of the property. *Conroy* v. *Woods*. 13 Cal. 634.

93. Attachment issues against H, and the sheriff proceeds with the writ to his store, which is locked and fastened front and rear by iron shutters. The sheriff with his deputy stand at the doors guarding all entrance. H now files his petition and schedule in insolvency, and the usual order of stay of proceedings is made. H returns to the store and advises the sheriff these things. The sheriff threatens to break open the store, when H gives him the key, and he enters and levies: held, that the sheriff had no right to levy, and that the property vested in the assignee of the insolvent, subsequently appointed by relation from the filing of the petition and schedule. *Taffts* v. *Manlove*, 14 Cal. 51.

94. A ratification cannot defeat rights of third persons acquired between the act of the agent and the ratification by the principal, as attachments levied on property of a debtor after a sale by or to an agent. *Taylor* v. *Robinson*, 14 Cal. 401.

95. The sheriff under his general powers cannot take anything but legal currency in satisfaction of an execution, and where he takes a note, indorses it on the execution and then returns it satisfied, the return is not conclusive, and perhaps not prima facie evidence of satisfaction, unless it shows some authority for receiving the note. *Mitchell* v. *Hackett*, 14 Cal. 666.

96. Plaintiff sues the sheriff for seizing certain chattels claimed by plaintiff. Defendant justifies under a writ of attachment in the suit of *F.* v. *C.*, and also under an execution issued upon a judgment had in that suit, setting up that plaintiff claimed the chattels by purchase from C., and that such purchase was fraudulent as to F., a creditor of C. After the evidence on both sides was closed, the court, on motion of plaintiff, struck out the attachment proceedings, judgment and execution, and all evidence justifying thereunder, on the ground that defendant had not proved *all* of the debt upon which the attachment issued: held, that this was error; that, had no debt been proved, the judgment and execution being introduced, with an offer to show a levy and sale thereunder, was enough, if not to justify the first seizure under the attachment, at least to diminish the damages, by showing that the property was appropriated by law to the proper purpose, to wit: paying C.'s debt, if it really were his property, or subject, as his, to the process because of the fraud. *Walker* v. *Woods*, 15 Cal. 69.

97. But even if any proof aliunde of C.'s indebtedness were required, when the attachment papers, affidavit, undertaking, etc., were regular on their face, the judgment was prima facie sufficient to admit the attachment papers in proof. *Ib.*

98. If, in justification by the sheriff under such attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff,

still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. *Ib.*

99. Plaintiff here cannot dispute the regularity of the proceedings in such attachment, unless they were void on their face. Defendant could show his attachment proceedings, the judgment, execution and levy, and then that the sale by C. to plaintiff was fraudulent. No proof of the indebteness of C. to F. was necessary, after showing the affidavit, undertaking and attachment; and no irregularities—in justifying sureties and the like—could be availed of by plaintiff. *Ib.*

V. Demand on a Sheriff.

100. Where a sheriff is notified before levy that a third person owns the property, the taking is tortious, and no demand is necessary to be proven in an action of replevin. *Ledley* v. *Hays*, 1 Cal. 161.

101. Where goods of a third party are mixed with the property or in the apparent possession of the judgment debtor, the sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay or refusal to deliver. *Daumiel* v. *Gorham*, 6 Cal. 44; *Taylor* v. *Seymour*, 6 Cal. 514.

102. Where no such notice or demand was proved, it was error to charge the jury "that the sheriff was a trespasser, and that they were to find the value of the goods." *Daumiel* v. *Gorham*, 6 Cal. 44.

103. In an action against a sheriff to recover property seized under process, or its value, by the owner, it is necessary that the plaintiff should show affirmatively notice and demand before bringing suit, otherwise he cannot recover in such action. *Killey* v. *Scannell*, 12 Cal. 75.

See Demand.

VI. Sale by the Sheriff.

104. Under proceedings in admiralty in rem, the interest of one part owner cannot be sold to satisfy a demand due from the vessel itself. *Loring* v. *Illsley*, 1 Cal. 29.

105. All the public streets of San Francisco running into the water, as laid down in the official map of the city, were by operation of the act of March 26th, 1851, extended and carried to the front line of the city, and as such are subject to the free enjoyment of the public and exempt from executions against the city. *Wood* v. *City of San Francisco*, 4 Cal. 193.

106. The statute regulating sheriff's sales of real estate does not design to invest the purchaser with a title until six months after the sales. *Duprey* v. *Moran*, 4 Cal. 196.

107. The nature of the interest to be sold under a decree of sale is sufficiently ascertained by a lease which is referred to and described in the decree. *Gaskill* v. *Moore*, 4 Cal. 235.

108. A purchaser at sheriff's sale acquires no right whatever against the sheriff for property sold, unless at the time of the sale he pays down in cash the whole of the purchase money. *People* v. *Hays*, 5 Cal. 68.

109. The right of a party to have his title to land protected from a sale which may create a cloud upon it, upheld. *Guy* v. *Hermance*, 5 Cal. 75.

110. If the sheriff, before a sale of real estate under execution, neglects to give the proper notice, the statute gives an adequate remedy against an officer; but it is not sufficient to set aside or avoid a sale. *Smith* v. *Randall*, 6 Cal. 50.

111. A party who purchases stock of an incorporation sold under execution, knowing they were under hypothecation, is chargeable with notice of the fact, and takes subject to the claim of the pledge. *Weston* v. *Bear River and Auburn W. and M. Co.*, 6 Cal. 429.

112. A sale by a sheriff under execution, of a house claimed as a homestead by the defendant in execution, and ascertained by appraisement to be worth over $5,000 should not be made until an exact appraisement of the value of the premises is obtained, so that the sheriff can convey a definite fractional undivided interest therein. *Gary* v. *Estabrook*, 6 Cal. 459.

113. Great inadequacy of consideration paid for land is sufficient to put the purchaser upon notice of a fraud by his vendor in the purchase thereof on execution at a constable's sale. *Argenti* v. *City of San Francisco*, 6 Cal. 679; *Hart* v. *Burnett*, 15 Cal. 608.

114. A purchaser at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor before the expiration of six months allowed for redemption, as often as the rent becomes due, under the terms of the lease existing when he purchased. *Reynolds* v. *Lathrop*, 7 Cal. 46.

115. The regularity of a sheriff's sale cannot be impeached by a stranger, or in a collateral proceeding. *Kelsey* v. *Dunlap*, 7 Cal. 162.

116. Tenants in common, or partners, have a right to acquire their cotenant's or copartner's interest by purchase under an execution sale, there being nothing in their relations to forbid it. *Gunter* v. *Laffan*, 7 Cal. 593.

117. Where a party purchased real estate at an execution sale upon the faith of the representations of a judgment creditor that his judgment was the first on the property, when in fact there were prior incumbrances on it of more than its value: held, that the purchaser should be relieved and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. *Webster* v. *Haworth*, 8 Cal. 25.

118. The writ of venditioni exponas is a simple order of the court to sell property already levied on under execution. It confers no power to levy, and a recital in the return that the sheriff had levied and sold by virtue of the writ is an unimportant error, when it appears that the levy had been previously made under execution. *Welch* v. *Sullivan*, 8 Cal. 186.

119. After the adoption of the common law in 1850, the municipal and common lands of pasturage were liable to execution sale. *Welch* v. *Sullivan*, 8 Cal. 197; contra *Hart* v. *Burnett*, 15 Cal. 616. See *Holladay* v. *Frisbie*, 15 Cal. 634; *Wheeler* v. *Miller*, 16 Cal. 125.

120. A sale under a void judgment passes no title. If the judgment is merely voidable, the sale is good. *Gray* v. *Hawes*, 8 Cal. 568.

121. In an action against a purchaser at sheriff's sale for not paying the amount of his bid, it cannot be set up as a defense that no sufficient notice of the sale was given. *Harvey* v. *Fisk*, 9 Cal. 94.

122. The title to real estate sold under execution does not pass until the execution and delivery of the sheriff's deed. *Anthony* v. *Wessel*, 9 Cal. 104.

123. A purchaser at a sheriff's sale may have a lien upon the property prior to that of the redemptioner. *Knight* v. *Fair*, 9 Cal. 118.

124. The interest of a miner in his mining claim is property, and may be taken and sold under execution. *McKeon* v. *Bisbee*, 9 Cal. 142.

125. An execution issued under a judgment of the district court rendered in 1850, before the judgment was signed by the district judge, is void, and a sale under such execution passes no title to the purchaser. *Wells* v. *Stout*, 9 Cal. 497.

126. A sheriff may be enjoined from selling real property belonging to the wife under an execution against the husband. *Alverson* v. *Jones*, 10 Cal. 12.

127. A complaint against a sheriff and his sureties for selling under execution the homestead of plaintiffs, which sets out that the sheriff was in possession of a certain execution against plaintiff J. Kendall, and under color of said execution wrongfully and illegally entered upon and sold certain property, the homestead of the plaintiffs, and averring in the sum of two thousand dollars, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action. *Kendall* v. *Clark*, 10 Cal. 18.

128. No damage can result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at such sale could acquire no right to the property, nor could the plaintiff suffer any injury. *Ib.*

129. A sheriff is not protected in the sale of personal property by the verdict of the jury in a trial of the right of property, under the provisions of section 218 of the code. *Perkins* v. *Thornburgh*, 10 Cal. 192.

130. A party may enjoin a sale of his property on execution against another for the other's debt. *Hickman* v. *O'Neal*, 10 Cal. 294.

131. The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff on an execution against one of the partners. *Waldman* v. *Broder*, 10 Cal. 380; *Jones* v. *Thompson*, 12 Cal. 198.

132. D. purchased a lot of land at sheriff's sale on execution, entered and improved the same. Afterwards D. removed

the buildings. On that day the defendants in execution sold the premises to T., who then redeemed the lot, and then sued D. for the value of the buildings: held, that as there was no evidence that the buildings were attached to the premises sold, T. cannot recover. *Tyler* v. *Decker*, 10 Cal. 436.

133. The general statute defines the duties of the sheriff in respect to final process. It declares "that the sheriff shall execute the writ (of fieri facias) by levying, etc., and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, etc., and if there be any excess he shall return the same to the judgment debtor. The acts are to be construed in pari materia. *Wilson* v. *Broder*, 10 Cal. 488.

134. Until a consummation of a sale of real property upon execution is made by a conveyance from the sheriff, the estate remains in the judgment debtor. Until then the purchaser possesses only a right to an estate, which may afterwards be perfected by conveyance. *Cummings* v. *Coe*, 10 Cal. 531.

135. The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud* v. *El Dorado County*, 12 Cal. 133.

136. The sheriff can only seize and sell an interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. *Jones* v. *Thompson*, 12 Cal. 198.

137. In such case the decree should not order a private sale of the firm property. The selling of cattle, sheep, etc., at private sale is dangerous as a precedent, and liable to great abuse in practice. *Jones* v. *Thompson*, 12 Cal. 200.

138. The registration act only protects purchasers. Creditors, as such, are not included within its provisions. But a judgment creditor purchasing at his own sale without notice is a bona fide purchaser within the act. *Hunter* v. *Watson*, 12 Cal. 377.

139. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all of its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy, and announced at the sale. *Crandall* v. *Blen*, 13 Cal. 23.

140. The payment by a judgment debtor of a judgment after a sheriff's sale extinguishes the lien; and the fact that he takes a transfer of the certificate and the sheriff's deed instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. *Mc Carty* v. *Christie*, 13 Cal. 81.

141. The purchaser at sheriff's sale of a water ditch is entitled to the rents and profits thereof from the date of the sale till the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant. *Harris* v. *Reynolds*, 13 Cal. 516.

142. A party in possession of premises under sheriff's sale, and receiving rents and profits during the time for redemption, should in equity, as between him and defendant in execution, pay the taxes assessed while he is so in possession. If the owner does not pay them, then the statute requires the party in possession to pay. *Kelsey* v. *Abbott*, 13 Cal. 619.

143. S. & B. in 1854 execute a mortgage on their property to H. Subsequently they execute another mortgage on the same property to plaintiff. Later, in 1855, S. conveys his interest to N., the deed declaring the interest to be sold subject to the two mortgages. Later, V. sells to defendant W., the deed containing the same recital as the last. In February, 1856, a decree of foreclosure of the first mortgage to H., sale of the property thereunder, defendant W. the purchaser, and in due time a sheriff's deed to him and possession. In June, 1855, foreclosure of the second mortgage to plaintiff, sale thereunder, plaintiff the purchaser, and in March, 1857, sheriff's deed to him: held, that the plaintiff cannot maintain ejectment against defendant W. on his sheriff's deed; that defendant claiming title through foreclosure of the first mortgage, and being in possession, cannot be dispossessed by B. *Brown* v. *Winter*, 14 Cal. 34.

144. A certificate of the sheriff of the purchase of property, as that of the defendant in execution, is not sufficient to entitle the holder to redeem as such successor, at least, not until the expiration of

the six months. *Haskell* v. *Manlove*, 14 Cal. 58.

145. Where a party to a judgment has obtained any advantage through the judgment, he must restore that advantage to the other party if the judgment be afterwards reversed. *Reynolds* v. *Harris*, 14 Cal. 679.

146. If, on sale under judgment, the plaintiff buys in the property, he must restore it to the defendant on reversal of the judgment. Otherwise, as to a stranger, a bona fide purchaser without notice. He is not within the rule. But to constitute himself such a purchaser, he must show that he has paid the purchase money, and also that he is the purchaser of the legal title, not of a mere equity. And a purchaser at execution sale is not clothed with the legal title until he receives a sheriff's deed. *Ib.* 680.

147. An assignee of a judgment and of the sheriff's certificate of a sale thereunder stands in the same position as his assignor, the plaintiff, after the judgment has been reversed, and the sale will be set aside and the property restored to the defendant where no loss or injury will be done the assignee. *Ib.* 681.

148. Where a party gets into possession of property, as a water ditch, under a sheriff's sale on a foreclosure of a mortgage, and the judgment on which such sale was made is afterwards reversed by the supreme court, and restitution of the property is ordered, the court below may, on motion, order such party in possession to account before a referee for the rents and profits received by him—that is, for the sales of water, etc. The right to such rents and profits being clear, the court will not, on a mere question of remedy, compel a direct suit for them. *Raun* v. *Reynolds*, 15 Cal. 469.

149. The common law method, in such cases, of an inquisition of damages by a sheriff's jury on the writ of restitution, would be impracticable, in estimating the rents and profits of a water ditch—involving, as the inquiry would, the receipts from sales of water every day for a long period, as also payments, expenses, etc. This is in its nature an equity proceeding; at least, to be disposed of according to equity practice. *Ib.*

150. The party so in possession, under sheriff's sale, is in no better position than if it be entered directly under the mortgage to enforce which the sale was made; and having received the proceeds of the property by way of sales of water, and appropriated the same to his own use, he cannot hold the property bound by the mortgage, and at the same time refuse to give the mortgagor the benefit of the amount so received. In equity he is not a purchaser, but a mortgagor; and though the sale was not set aside until after the receipts of the rents and profits, still, when it was set aside, the order took effect upon the relations of the parties as they existed before the sale—the mortgagor and the mortgagee have the same rights they had before. *Ib.* 471.

151. Defendant, as coroner and acting sheriff, levied on and advertised for sale all the right, title and interest of T. in certain horses and cattle in the hands of a receiver appointed in a suit between J. and T., as partners: held, that plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable; and that this must appear by a clear showing of the plaintiff's right to the property and defendant's insolvency. *More* v. *Ord*, 15 Cal. 206.

152. The municipal lands to which the city of San Francisco succeeded as a pueblo were held in trust for the public use of the city, and were not, either under the old government or the new, the subject of seizure and sale under execution. *Hart* v. *Burnett*, 15 Cal. 616.

153. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition, either precedent or subsequent, annexed to the grant; and the property mentioned in the act is not devoted by the grant of the State to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is a leviable interest, subject to sale under execution. *Holladay* v. *Frisbie*, 15 Cal. 636; *Wheeler* v. *Miller*, 16 Cal. 125.

154. *Smith* v. *Morse*, 2 Cal. 524, deciding that the city's interest in this beach

and water lot property can be sold on execution against the city, not to be disturbed; but any rights which "the commissioners of the funded debt of the city of San Francisco," under the act of May 1st, 1851, may possess in this property are not passed on. *Holladay* v. *Frisbie*, 15 Cal. 637.

155. A purchaser of beach and water lot property at a sheriff's sale, in August, 1851, on execution issued upon a judgment recovered in January, 1851, against the city of San Francisco, acquired a title, if the judgment became a lien upon the property sold previous to the act of May 1st, 1851, and the conveyance from the commissioners of the sinking fund to the commissioners of the funded debt. *Wheeler* v. *Miller*, 16 Cal. 125.

156. In this case, as the record does not show that the judgment ever became such lien, the decision, giving title to the purchaser, must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. *Ib.*

157. The lien of a judgment is purely the creature of statute, and in this State the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court. *Ackley* v. *Chamberlain*, 16 Cal. 182.

See EXECUTION.

VII. SHERIFF'S DEED.

158. A deputy sheriff may execute a deed for land sold under execution, but in the name of his principal, otherwise it is decisive against the party claiming under it. *Lewes* v. *Thompson*, 3 Cal. 266.

159. A claim of title by virtue of a sheriff's deed is insufficient without showing the judgment which authorized the sale. *Sullivan* v. *Davis*, 4 Cal. 292.

160. A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money on the ground that he is entitled to it as oldest judgment and execution creditor; especially where there is an unsettled contest as to the priority of his lien. *Williams* v. *Smith*, 6 Cal. 91.

161. It is error to decree that the sheriff should execute a deed to the purchaser on the foreclosure sale, the land sold being subject to redemption in six months. *Harlan* v. *Smith*, 6 Cal. 174.

162. Where the sheriff who made the sale of land under a writ partially executed by him while in office, dies before executing a conveyance, the law having failed to provide for the completion of the execution in such a case, the only remedy left to the purchaser is to apply to the court for the appointment of a commissioner or master to execute the conveyance. *People* v. *Boring*, 8 Cal. 407; *Anthony* v. *Wessel*, 9 Cal. 104.

163. The title to real estate sold at sheriff's sale does not pass until the execution and delivery of the sheriff's deed. *Anthony* v. *Wessel*, 9 Cal. 104.

164. A sheriff, who sells land under execution, and gives a certificate of the sale to the purchaser, and subsequently his term of office expires, is the proper person to make the deed. *Ib.*

165. Where parties claim under a deed executed by the sheriff, upon a sale on execution, they are chargeable with notice of the defects in the judgment upon which the execution issued. *Wells* v. *Stout*, 9 Cal. 497.

166. Where a sheriff's deed is executed by a deputy, in the name of a sheriff whose term of office had expired at the time of the execution of the deed, the authority of the deputy must be shown to authorize such deed to be read as evidence in an action of ejectment. *Cloud* v. *El Dorado County*, 12 Cal. 134.

167. In an action against a sheriff for special damages resulting from a refusal on the part of the sheriff to make and deliver to plaintiff a deed to certain premises purchased by plaintiff at sheriff's sale, where there is no allegation in the complaint of title, nor any averment that in case the deed had been executed, plaintiff would have been able to recover possession of the premises or the rents and profits: held, that such complaint is insufficient. *Knight* v. *Fair*, 12 Cal. 297.

168. On mandamus by the assignee of

a sheriff's certificate of sale to compel the execution of a deed, the question whether such certificate is not merged in a deed made to the assignee by the execution debtor after the sale cannot be tried. The right to the deed is the only matter in controversy. *People* v. *Irwin*, 14 Cal. 436.

169. Where a defendant in ejectment brought upon a sheriff's deed, executed upon a purchase made on a sale under a decree of foreclosure, and was also a party to the foreclosure suit, he is concluded by the decree from setting up a title which was in that suit adjudicated against him. *Clark* v. *Boyreau*, 14 Cal. 637.

170. The damages which a plaintiff can recover in an action of ejectment, for the use and occupation of the premises, are such as arise subsequent to the accruing of his rights of possession, and when his right depends upon a sheriff's deed, he cannot recover in this form of action for the use and occupation for the six months intervening the sale and the execution of the deed. *Ib.*

SHIPPING.

See ADMIRALTY, BILL OF LADING, CHARTER PARTY, VESSELS.

SIGNATURE.

1. Courts will take judicial notice of the signatures of their officers as such, but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence the court cannot notice them. *Alderson* v. *Bell*, 9 Cal. 320.

SLANDER.

See LIBEL AND SLANDER.

SLAVERY.

See NEGRO.

SOLDIER.

1. The mere fact that a man is a soldier in the United States army does not disqualify him from voting in this State. But he cannot vote unless he has been a citizen of the State and of the county in which he votes for the constitutional period. *People* v. *Riley*, 15 Cal. 49.

2. A mere residence or sojourn in the country as a soldier does not make him a citizen, or prove him to be such. The rule as fixed by the constitution is, that the fact of such sojourn or residence as a soldier neither creates nor destroys citizenship—leaving the political status of the soldier where it was before. *Ib.*

3. A copy of a copy of a muster roll of United States soldiers is not admissible in evidence to prove a man to be a soldier. *Ib.* 50.

4. Where the right of a United States soldier to vote is contested, the burden of proof is upon the contestant. *Ib.*

SOLE TRADER.

1. In an action against a femme sole trader, it is improper to join her husband with her as defendant, and a complaint so drawn is demurrable. *McKune* v. *McGarvey*, 6 Cal. 498.

2. The effect of our statute is to make a femme sole of a married woman who is a sole trader, as to the particular business in which she is engaged. *Ib.*

3. In an action brought by a married woman concerning property belonging to her as a sole trader, the husband need not be joined. *Guttman* v. *Scannell*, 7 Cal. 458.

4. By the provisions of the sole traders' act, the legislature designed to afford to every married woman an opportunity of providing against the improvidence or misfortunes of her husband, by engaging in any legitimate calling, by protecting her earnings against her husband and his creditors, and enabling her, by her own energy and industry, to support herself and children. *Ib.*

5. So far from forbidding, the law, by the plainest implication, intends that the capital invested by the wife as a sole trader, to the extent of $5,000, may be furnished by the husband. *Ib.*

6. If the husband at the time was insolvent, the transfer as to his creditors would be fraudulent and void. *Ib.*

7. The act does not confine sole traders to any particular trade or occupation, nor prohibit the husband from being employed by or acting for his wife in the business. *Ib.* 459.

8. The fact that the business was unsuited to the sex of the wife, and the employment of the husband therein, would be circumstantial evidence tending to establish fraud, but not conclusive evidence of it.

9. The right of the wife to acquire property by purchase, during the marriage, can only exist as an exception to the general rule as laid down by the act defining the rights of husband and wife, and this exception exists in the case of a sole trader by statute. *Alderson* v. *Jones*, 10 Cal. 12.

See HUSBAND AND WIFE, II, 7.

SOVEREIGNTY.

1. The sovereign power may, in disposing of lands, annex such conditions to a grant as it sees fit; and in such a case a restriction against alienation, inserted in a grant and authorized by law, will not be held void on the ground that it is against the policy of the law. *Suñol* v. *Hepburn*, 1 Cal. 274.

2. The State has an absolute right to control, regulate and improve the navigable waters within its jurisdiction, as an attribute of sovereignty. *Gunter* v. *Geary*, 1 Cal. 467.

3. The mines of gold and silver in the public lands are as much the property of the State, by virtue of the sovereignty, as are similar mines in the hands of a private proprietor. *Hicks* v. *Bell*, 3 Cal. 227.

4. The State, therefore, has the sole right to authorize them to be worked, to pass laws for their regulation, to license miners, and affix such terms and conditions as she may deem proper to the freedom of their use. *Ib.*

5. The United States, as owner of land within the limits of the State, only occupies the position of any private proprietor, with the exception of exemption from State taxation. *Ib.*

6. Each State is supreme within its own sphere as an independent sovereignty. *People* v. *Coleman*, 4 Cal. 49.

7. By well settled rules of construction, the right of the State to regulate commerce is concurrent with that of Congress, with the understanding always that all State regulations inconsistent with those of the federal government on this subject give way. *Ib.* 58.

8. The right of the State to lands under water, where the tide ebbs and flows, is founded upon her sovereign control over the easement, or right of navigation; where, therefore, the easement is destroyed, the right of the State ceases, except to prosecute for prepresture, and have the easement restored. *Guy* v. *Hermance*, 5 Cal. 74.

9. The federal government has not only the right of eminent domain, but the fee and the prime and uncontrolled right of disposition of the territory, all of which are attributes of sovereignty. *People* v. *Folsom*, 5 Cal. 377.

10. Sovereignty can never be in abeyance, and until there was some local government organized, either by the people of the territory or some other competent authority, the United States, upon the doctrine of necessity, succeeded to and repre-

sented the government of Mexico, as far as the same could be exercised, within the purview of the constitution. *Ib.* 378.

11. The government of the United States, in the face of the notorious occupation of the public lands in this State by her citizens—that upon the lands they have mined for gold, constructed canals, built saw mills, cultivated farms, and practiced every mode of industry—has asserted no right of ownership to any of the mineral lands in this State. *Conger* v. *Weaver*, 6 Cal. 557.

12. Sovereignty is a unit that cannot in its very nature be divided. It must reside with only one party, and the highest ultimate right to determine the limits and powers of each, must belong to that government with which is found the supreme law of the entire nation. *Warner* v. *Steamer Uncle Sam*, 9 Cal. 720.

13. Money is not the species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. *Burnett* v. *City of Sacramento*, 12 Cal. 83.

See EMINENT DOMAIN.

SPECIFIC PERFORMANCE.

1. A., the owner of a lot of land in San Francisco, requested B. to sell the same, and delivered to him the title deeds in order to enable him to effect a sale. B. agreed verbally with the plaintiff to sell the land to him, but A. refused to comply with the verbal agreement which B., his agent, had made with plaintiff: held, in an action by the plaintiff against A. to compel the execution of a deed or the payment of damages, that the agreement was void and could not be enforced, and that the defendant A was not liable in damages. *Harris* v. *Brown*, 1 Cal. 100.

2. A specific performance of a contract for the conveyance of land can be enforced only when the contract is in writing, or where there has been part performance of a verbal contract by the vendee. *Hoen* v. *Simmons*, 1 Cal. 121.

3. Where the terms of a verbal contract are reduced to writing, but the written paper is neither signed nor delivered, the contract will be deemed inchoate and incomplete and neither party will be bound by it. *Ib.*

4. A party who seeks a specific performance of a verbal contract for the conveyance of real estate, should show that he has fully complied with the substance of the contract on his part. *Ib.*

5. Where A contracted verbally to convey to B a certain lot of land for $5,000, of which sum $1,000 was to be paid down and the balance in two months, with interest at the rate of two per cent. a month, and the time for the payment of the $4,000 had elapsed long before the commencement of the suit: held, the plaintiff not having paid or tendered the $4,000 with interest, that a specific performance ought not to be decreed. *Ib.*

6. The case of *Hoen* v. *Simmons*, 1 Cal. 119, deciding that a verbal contract of itself alone was insufficient under Mexican law to transfer the title to real estate, affirmed; but where a verbal contract of sale in præsenti and the title deeds were delivered by the vendor to the vendee, and permission given to the vendee to enter and take possession of the land, and the vendee did accordingly take possession and make valuable improvements on the premises: held, that a specific performance of the verbal contract should be decreed. *Tohler* v. *Folsom*, 1 Cal. 210.

7. Where there has been such part performance of a verbal contract of sale by the plaintiff as to put him into a situation which would operate as a fraud upon him, unless the verbal agreement should be enforced, a specific performance of the contract will be decreed. *Ib.* 213.

8. A party seeking to enforce a specific performance of a contract must show that he has acted in good faith. *Conrad* v. *Lindley*, 2 Cal. 175.

9. A party entering upon land under an agreement to purchase, and afterwards abandoning the purchase disclaiming the title of the vendor, forfeits the benefit of the agreement and cannot on subsequently tendering the purchase money claim a specific performance. *Ib.*

10. On a bill for specific performance, defendant alleged fraud in the contract sued upon, but admitted payment of the consideration money under protest, affirming the fraud: held, that the receipt of

payment was no waiver of the defense and that defendant was not estopped from showing the fraud, and that it was error in the court not so to instruct the jury when requested. *Russell* v. *Amador*, 3 Cal. 402.

11. An unwritten contract for the sale of land is void, by the express declaration of the statute of frauds, and a court of equity has no power to enforce a specific performance of it. *Abel* v. *Calderwood*, 4 Cal. 91.

12. A court of equity is always chary of its power to decree specific performance, and will withhold the exercise of its jurisdiction in that respect, unless there is such a degree of certainty in the terms of the contract as will enable it at one view to do complete equity. *Morrison* v. *Rossignol*, 5 Cal. 66.

13. Lands held by no other tenure than possession may be legitimate subjects of control; and sometimes, in equity, chattel interests or personal property are made the subject of specific performance. *Johnson* v. *Rickett*, 5 Cal. 219.

14. In an action for specific performance against a vendor who refused to make a title, it is not necessary that a deed should be tendered him for his execution, but tender of the unpaid purchase money must be proven. *Goodale* v. *West*, 5 Cal. 341.

15. A court of equity will not enforce a specific performance of an agreement to convey lands, when the plaintiff shows no compliance, or offer of compliance on his part with the agreement, nor any excuse therefor, for any length of time from which he bound himself to perform. *Brown* v. *Covillaud*, 6 Cal. 571; *Pearis* v. *Covillaud*, 6 Cal. 621; *Green* v. *Covillaud*, 10 Cal. 324.

16. Courts of equity in this State possess power to enforce the specific performance of verbal contracts for the sale of land, in cases of part performance of such contracts. *Arguello* v. *Edinger*, 10 Cal. 158.

17. Nothing can be regarded as a part performance, to take a verbal contract for the sale of land out of the operation of the statute, which does not place the party in a situation which is a fraud upon him, unless the contract be executed. *Ib.*

18. It would be a fraud, which no court of equity could tolerate, to hold that the vendor of land, on a contract to convey, receiving a portion of the purchase money and seeing the vendee expend large sums improving the property without objection, and not making any demand of the purchase money, should insist, because the vendee had not literally complied with the provisions of his contract on his part, on holding the whole contract forfeited, claim the land and the money paid and all the improvements, and deny all obligation on his part to comply with his engagements. *Farley* v. *Vaughn*, 11 Cal. 236.

19. In such a case, where there has been a compliance with a reasonable understanding of the contract, and no injury done by the want of an exact compliance, a specific performance will be decreed, *Ib.*

20. A bill quia timet, and to enforce the specific execution of a contract, lies only where there is no adequate remedy at law; but where damages resulting from the breach of such agreement are susceptible of precise admeasurement, equity will not take jurisdiction, unless there are some peculiar equitable circumstances. *White* v. *Fratt*, 13 Cal. 523.

21. Whether equity will enforce the specific performance of a contract depends, not upon the character of the property involved, as whether it be real or personal, but upon the inadequate remedy afforded by a recovery of damages in an action at law. *Duff* v. *Fisher*, 15 Cal. 381.

STAGE COMPANIES.

See COMMON CARRIERS, CORPORATIONS.

STARE DECISIS.

1. There is no principle which compels the observance of the doctrine of stare decisis, when a rule well settled and universally acquiesced in has been violated. *Cohas* v. *Raisin*, 3 Cal. 453.

2. In construing statutes and the constitution, the rule is almost universal to adhere to the doctrine of stare decisis. *Seale* v. *Mitchell*, 5 Cal. 403.

3. A rule once established and firmly adhered to, may work apparent hardship in a few cases, but in the end will prove more beneficial than if constantly deviated from. *Giblin* v. *Jordan*, 6 Cal. 418.

4. When a case has been once taken to an appellate court and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot, on a second appeal, be altered or changed. *Dewey* v. *Gray*, 2 Cal. 377; *Weston* v. *Bear River and Auburn W. and M. Co.*, 6 Cal. 429; *Clary* v. *Hoagland*, 6 Cal. 687; *Gunter* v. *Laffan*, 7 Cal. 592; *California Steam Navigation Co.* v. *Wright*, 8 Cal. 592; *Cahoon* v. *Levy*, 10 Cal. 216; *Davidson* v. *Dallas*, 15 Cal. 82.

5. The judge who, from petty vanity and for the sake of showing himself more wise and learned than his predecessors, would overturn a rule which for years has settled the rights of property, should be regarded as the common enemy of mankind and unworthy of the high trust which had been confided to him. *Welch* v. *Sullivan*, 8 Cal. 188.

6. The highest regard for the doctrine of stare decisis does not require its observance when a plain rule of law has been violated. *McFarland* v. *Pico*, 8 Cal. 631.

7. In reference to mere matters of practice, involving no principle, it is safe to adhere to a rule long established. *Piercy* v. *Sabin*, 10 Cal. 30.

8. The conservative doctrine of stare decisis was never designed to protect manifest innovations upon the well settled principles of law. *Aud* v. *Magruder*, 10 Cal. 292.

9. Though on questions of practice previous decisions are entitled to very great weight, still a single decision, made without notice of a statute, and in fact setting aside the statute, cannot be invoked as authority on the principle of stare decisis. *Duff* v. *Fisher*, 15 Cal. 382.

10. The rule of stare decisis and the various authorities thereupon fully discussed. *Hart* v. *Burnett*, 15 Cal. 579.

11. In the doctrine of stare decisis some of the authorities use the terms "a series of decisions," "an uninterrupted series," "a long established rule," and the like expressions; but we apprehend that the language was designed to imply not solely the age of the rule, but its permanent, settled, stable character. *Ib.* 607.

STATE.

1. Where the people of the State are appellants it is not necessary to file the usual undertaking on appeal. *People* v. *Clingan*, 5 Cal. 391.

2. In the absence of any statute to that effect the State cannot be sued, and a judgment against her is erroneous. *People* v. *Talmage*, 6 Cal. 258.

3. Neither the governor nor the attorney general has any power to bind the State by a contract to procure the advice of counsel as to the rights of the State in certain property. *Ib.*

4. Services performed for the State under such a contract might be the subject of relief at the hands of the legislature, but are not a legal cause of action. *Ib.*

5. The State, in the contemplation of our theory of constitutional government, can have no interest in asking anything but that which is right; nor can she allow her agents to do so. She is as much interested in protecting the individual citizen as in protecting the mass; so that to address judicial process to the agents of the State does not implead the State herself. *Nougues* v. *Douglass*, 7 Cal. 74.

6. In a case where a citizen claims to be injured by an alleged failure of a State officer to do his duty, the State is not a formal party to the record nor responsible for costs in any event. Nor if the officer had failed to do his duty, can the State be injured by the decision of the court. Neither can she be injured if the officer does his duty, and is sustained by the court. *Ib.*

7. On the formation of this State, the title to water property passed to this State. *Chapin* v. *Bourne*, 8 Cal. 296.

8. The eighth article of the constitution, prohibiting the State from creating debts over three hundred thousand dollars, or loaning its credit, etc., only applies to the

State as a corporation, as a political sovereign represented by her law-making power, and does not prevent the State authorizing counties or municipal corporations to create debts when the debt of the State itself is up to the constitutional limit. *Pattison* v. *Supervisors of Yuba County*, 13 Cal. 182.

9. The State may have political subdivisions; that is, she may permit a portion of her powers of government to be exercised by local agents. But, politically considered, geographical or political departments are no more the State, or a part of the State, than a man's land, or his agent, is part of himself. *Ib.*

10. Where the governor of a State, who is authorized, and it is made his duty by law, to take immediate possession of the State prison and grounds, then in the possession of a lessee of a State, goes, in company with other officers of the State, upon the grounds of the prison and demands of the person in charge the keys of the prison, which being refused, the door of the room in which the keys were was forced by order of the governor and the keys taken, and thus the possession of the prison and grounds taken by the governor in the name and on the behalf of the State: held, that such acts amounted to a forcible entry on the part of the governor and he is personally liable therefor: held further, that the acts of the governor warranted the conclusion that any attempt on the part of the lessee to resume possession of the prison would be resisted by force. *McCauley* v. *Weller*, 12 Cal. 531.

11. Warrants drawn by the controller of State, delivered to the payees thereof and by them endorsed in blank, were presented by the holders to the State treasurer, and on payment were delivered to him. They were afterwards stolen from the office of the treasurer. The warrants, on their face indicating a just and legal claim against the State, came into the hands of defendants, ignorant that they had been stolen. Defendants present them to the treasurer, and in lieu thereof receive State bonds payable to bearer, under the funding act of 1857, and part with them. The State sues for the bonds or their value: held, that the action does not lie, that defendants having received the bonds bona fide, and without fraud, for warrants apparently good against the State, are not liable in this form of action. *State* v. *Wells*, 15 Cal. 344.

12. The duty imposed by the forty-ninth section of the revenue act of 1857, for selling goods at public auction, is not a tax on the auctioneer, but a tax on the sale of goods or the proceeds of the sale—the auctioneer being made the collector of the State for the amount of the tax. *State* v. *Poulterer*, 16 Cal. 521.

13. This duty may be collected by action of debt by the State against the auctioneer, and the penal remedy afforded by the fifty-second section of the act is not an exclusive remedy. *Ib.*

14. This suit not being a prosecution, but a civil action for the recovery of money due the State, is properly brought in the name of the State. *Ib.*

See EMINENT DOMAIN, SOVEREIGNTY.

STATE DEBT.

See INDEBTEDNESS.

STATE OFFICERS.

See OFFICE.

STATE RIGHTS.

See EMINENT DOMAIN, SOVEREIGNTY.

STATE PRISON.

1. Where the governor of the State,

who is authorized, and whose duty it is made by law, to take immediate possession of the State prison and grounds then in possession of a lessee of the State, goes in company with other officers of State upon the grounds, and demands possession, which was refused, and the room where the keys were kept was forced by the governor, and the keys taken, and possession of the prison and grounds taken by the governor in the name and on behalf of the State: held, that such acts amounted to forcible entry and detainer on the part of the governor, and he is liable therefor. *McCauley* v. *Weller*, 12 Cal. 531.

2. Although the State possesses the constitutional power to take private property for public purposes, by providing just compensation therefor, yet the means of compensating the owner must be provided before the property is taken. *Ib.*

3. The act of February 26th, 1858, under which the governor justified the taking, made no provision for compensation, and is therefore clearly in violation of the eighth section of article one of the constitution of the State. *Ib.*

4. The objection to the contract with Estill, under the act of the twenty-first of March, 1856, that it contained stipulations for the release of claims held by Estill against the State, thereby increasing the amount of the monthly payments, cannot be raised at this late day—three years having elapsed since the execution of the contract, and it having been in part performed on both sides, and thus acquiesced in and affirmed. *State of California* v. *McCauley*, 15 Cal. 455.

5. The fact that the contract with Estill was signed by the commissioners with their individual names, and not with the name of the State, does not make it defectively executed. The contract purports in its body to be between the State, acting by the commissioners under the act of March 21st, 1856, of the one part, and Estill of the other, and is signed by the commissioners with the affix of "Board of State prison commissioners." This makes it the contract of the State and not of the commissioners. *Ib.* 456.

6. Upon this point, the rule applicable to contracts of a private character differs from the rule governing contracts made by agents of the government. Such public agents are presumed to contract, not personally, but officially, within the sphere of their duties. *Ib.*

7. The act of March, 1856, having authorized the commissioners to execute a lease, without prescribing any specific form, or containing any restrictions as to assigning, and the lease being in its terms assignable, and no objections to this form of contract having been made at the time, it is too late to interpose them after the contract has been acted upon on both sides, and thus adopted and approved. The personal liability of the assignor continued after his assignment to McCauley. The security of his bond was not impaired thereby. *Ib.* 457.

8. If some of the covenants of the lease do not bind the assignee, the State cannot have relief on that ground. She can claim no greater exemption than an individual from the consequences of an unwise contract. *Ib.* 458.

9. The State cannot rescind the contract made with Estill for breaches of the covenants of the lease by him and his assignee, so long as she herself is in default. *Ib.*

10. One party cannot violate a contract himself, and then seek to rescind it on the ground that the other party has followed his example. *Ib.*

11. Nor, when the contract has been in part performed, and the parties cannot be restored to their original position, can the right of rescission exist. *Ib.*

12. In this case, the State, being in default in making the monthly payments under the contract as they became due, and for months previous to this suit refusing to pay at all; not offering to make restitution of the property received of the lessee, or pay the value of the claims relinquished by him at the execution of the contract, or to pay what the complaint shows to be now due; and it not being possible to restore Estill and McCauley to their original position, they having been in possession of the prison for nearly three years, and having performed valuable services; cannot claim in equity a rescission of the contract. *Ib.*

13. It is too late for the State to complain that the contract did not exact of the lessee security against breaches thereof, other than the bond of $200,000 required by the act of March 21st, 1856, or did not reserve to the State the right to re-

State Prison.—Statement in general.

enter and resume possession of the premises, and control of the prisoners, whenever she deemed proper. *Ib.* 459.

14. *State of California* v. *McCauley*, 15 Cal. 429, deciding the act of March 26th, 1856, appointing a board of State prison commissioners, to be constitutional, and the contract entered into by said board, in behalf of the State, with Estill, and the assignment thereof to McCauley, to be valid and binding upon the State, affirmed. *People* v. *Brooks*, 16 Cal. 25.

15. A contract entered into by the agents of the State, upon a subject within the constitutional control of the legislature, may be affirmed by the State by legislation, indirectly referring to the contract, or proceeding upon its assumed validity. Direct legislative action, in terms designating and affirming the contract, is not necessary. *Ib.* 26.

16. In the act of April 7th, 1856, appropriating moneys to defray the expenses of the prison up to March 28th, passed after a copy of the contract with Estill had been transmitted to the senate, the legislature recognized the existence, and in effect, the validity of the contract, in the provision that no person should receive any pay for supplies furnished under any contract with the directors of the prison, until he surrendered such contract and released the State from all liability for such supplies "furnished *after the leasing* of said prison by the board of commissioners, under an act passed at this session of the legislature." *Ib.* 27.

17. The contract is not from month to month, but for the entire term of five years, the payments by the State to be made in monthly installments. The consideration advanced by the lessee for these payments is not merely the services rendered each month. It consists of buildings erected and other improvements made. These were not intended for any particular month, but for the entire term. The expenses of them cannot be apportioned out and considered as belonging to one or more months rather than others. These expenses probably absorbed the receipts of many months, and for reimbursement the lessee undoubtedly looked to the general profits from the entire contract. Again, large claims against the State were relinquished by the lessee as part of the consideration of the payments by the State—not of one or of several months, but of the entire term. To the general profits of the whole term the lessee looked, as furnishing the equivalent for the relinquishment. Again, the lessee, or the other parties representing him, were entitled to the labor of convicts, and the profits of that labor, in the manufacture of brick or other articles of commerce, during the period the parties were excluded from the prison, may have exceeded the entire expenses of keeping the prison. *Ib.* 38.

18. If the State desire to resume the possession of the State prison, and the control of the convicts, she can do so only in one way—by compensation, as is required in all cases where private property is taken for public use. The leasehold interest is as much property for which compensation is to be made before it can be subjected to the uses of the State, as are lands held in fee. If the State has cause of complaint from the mismanagement of the prison, or any disregard of the stipulations of the contract, she must seek her redress, as individuals in like cases are required to do, by proceeding upon the bond executed as security for the performance of the contract. *Ib.* 47.

STATEMENT.

I. In general.
II. On Motion for New Trial.
III. On Appeal.
IV. Amendment to a Statement.

I. In general.

1. We are to look at the substance of the contents of the statement, and disregard its imperfections in form. *Ringgold* v. *Haven*, 1 Cal. 113.

2. In a statement for a new trial the evidence may be simply referred to, and need not be contained in the statement itself. It is not so in a statement on appeal, in which the evidence, if relied upon, must be set out. *Dickenson* v. *Van Horn*, 9 Cal. 211.

II. On Motion for New Trial.

3. An order for a new trial will be set aside where the defendant had failed to file a statement as required by statute. *Hill* v. *White*, 2 Cal. 307; *Hart* v. *Burnett*, 10 Cal. 66.

4. If the statement filed in support of a motion for a new trial is not settled by the judge, it cannot be therefore inferred that it was agreed to. Such statement must either be agreed to, or it must be settled by the judge, and one of these conditions must be shown affirmatively. In the absence of both, such statement will be rejected. *Linn* v. *Twist*, 3 Cal. 89.

5. A notice of a motion for a new trial unaccompanied by the affidavit required by the statute, will not entitle the statement of the grounds of the motion to be considered on appeal. *Adams* v. *City of Oakland*, 8 Cal. 510.

6. When it appears from the bills of exceptions signed by the judge, that the motion for a new trial was heard on statement, counter statement and affidavits, it cannot be objected that the statement was not settled. *Williams* v. *Gregory*, 9 Cal. 76.

7. Where a party appears and argues a motion for a new trial, he cannot afterwards object that the statement was not agreed to by him, and that it was not settled by the judge. *Dickenson* v. *Van Horn*, 9 Cal. 211.

8. A failure to file a statement setting forth the grounds upon which a party intends to rely, in a motion for a new trial, operates as a waiver of the right to the motion. *Wing* v. *Owens*, 9 Cal 247.

9. Where the statement embodied in the record was filed on the motion for a new trial, the supreme court will only examine the action of the court below in denying the motion. *Meerholz* v. *Sessions*, 9 Cal. 277.

10. Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all grounds of error based on the affidavits, but the omission does not affect his right to raise the questions as to errors apparent on the face of the record. *Branger* v. *Chevalier*, 9 Cal. 362.

11. An order denying a motion for a new trial, where there is no statement settled on file, is erroneous. *Hart* v. *Burnett*, 10 Cal. 66.

12. Where the statement on motion for a new trial is not filed within the time prescribed by law, this court will only look to the judgment roll. *Lafferty* v. *Brownlee*, 11 Cal. 132.

13. A statement which was filed in the court below on motion for a new trial, and is neither agreed to by counsel or settled by the judge trying the case, has not sufficient authentication to constitute any portion of the record which this court can notice. *Doyle* v. *Seawall*, 12 Cal. 425; *Paige* v. *O'Neal*, 12 Cal. 492.

14. A rule of a district court requiring a party, on motion for a new trial or for judgment on a special verdict, to prepare and submit a statement of the evidence at the trial, does not apply to issues submitted to a jury in a chancery case. *Purcell* v. *McKune*, 14 Cal. 232.

15. But where the judge below requires such statement in a chancery case, and the attorney does not object, but fails to furnish it, and in consequence thereof the court, on motion of plaintiffs for judgment on the pleadings and verdict, refuses to proceed until such statement is furnished, mandamus will not lie. *Ib.*

16. The court below must take the steps by it deemed necessary and proper in the premises. It may rehear the cause on the pleadings and proof, or possibly it may require the attorney to prepare the statement. *Ib.*

17. A statement on motion for new trial, signed by the judge and appearing from the minutes of the court to have been used on the hearing on the motion, is sufficiently authenticated. The statute points out no mode of authentication, and any satisfactory evidence in the record, in some legitimate and proper form, that the statement has been examined and approved by the judge, is sufficient. *Kidd* v. *Laird*, 15 Cal. 177.

III. On Appeal.

18. The presumption is that all the important testimony is embodied in the statement, and the supreme court must decide therefrom whether the evidence warrants

the verdict. *Ringgold* v. *Haven*, 1 Cal. 115; *Swanston* v. *Sublette*, 1 Cal. 124.

19. It is the duty of each party, upon the settlement of the bill, to see that all the evidence material for him in assisting in sustaining or recovering the decision appealed from is spread upon the minutes. *Ringgold* v. *Haven*, 1 Cal. 116.

20. In the absence of any testimony in the record, the appellate court will presume that the court below rendered a proper verdict upon the evidence. *Belt* v. *Davis*, 1 Cal. 139; *Folsom* v. *Root*, 1 Cal. 376.

21. The clerk should certify the statement, not only that it is a correct transcript, but that it contains the whole proceedings in the cause. *Belt* v. *Davis*, 1 Cal. 139.

22. Where the defense to an action is that there was no contract in writing of the sale, but the evidence given at the trial did not appear to be fully returned, and no objection was raised or exception taken to the insufficiency of the evidence, the appellate court will presume that the evidence was sufficient to warrant the verdict. *Bunting* v. *Beideman*, 1 Cal. 182.

23. It is not necessary to file a contract if there be one with the clerk, and his certificate that he has returned all the papers in the cause on file in his office, does not show that no contract in writing was proved; it merely shows it was not filed. *Ib.*

24. The supreme court will not consider the statement unless it appears as settled by the parties or taken down by the clerk in writing at the request of one of the parties. *Ib.*

25. If the statement discloses no refusal on the part of the judge in the court below to charge the jury in any matter submitted, nor is any erroneous charge assigned as error, the verdict of the jury must be considered as having settled all the facts in the case. *George* v. *Law*, 1 Cal. 364.

26. An appellate court will not review the rulings of the court below unless presented in proper form in a statement or bill of exceptions. The testimony must be taken down by the clerk, but he is not authorized to say what decisions the court did or did not make. *Gunter* v. *Geary*, 1 Cal. 464; *Pierce* v. *Minturn*, 1 Cal. 471.

27. A mere transcript of the evidence taken down by the clerk is no part of the statement, unless made so by bill of exceptions or by the signature of the judge. *Wilson* v. *Barry*, 2 Cal. 56.

28. Where the evidence is taken down by the clerk, on motion of a party, a transcript of which is certified by him, is a substitute of a bill of exceptions or statement of facts, in the absence of such bill or statement. *Ingraham* v. *Gildermeester*, 2 Cal. 61.

29. If the appellant allow the statute time to expire after taking the appeal without framing his statement, he waives his right to have a case stated, and a subsequent order of the court made without notice to the respondent, allowing further time to make up the statement, is a nullity. *Leech* v. *West*, 2 Cal. 95.

30. If the statement does not explicitly state the particular ground of granting the nonsuit, yet if it be a necessary inference from what is disclosed, it is sufficient for the action of the appellate court, and will be reversed if erroneous. *Morgan* v. *Thrift*, 2 Cal. 563.

31. Errors which are relied upon on appeal must be set forth in the statement, clearly and affirmatively. *Rabe* v. *Wells*, 3 Cal. 151.

32. The naked directions of a court to a jury, unaccompanied by a statement of facts, will not satisfy the supreme court of substantial error, although some of the directions may not be in consonance with the rules of law. *White* v. *Wentworth*, 3 Cal. 426; *Nelson* v. *Lemmon*, 10 Cal. 50; *Nelson* v. *Mitchell*, 10 Cal. 93.

33. If the statement is not properly authenticated it forms no part of the record, and the appellate court will not consider it, but will only look to the judgment roll alone. *Vermeule* v. *Shaw*, 4 Cal. 215; *Garcia* v. *Sastrustegui*, 4 Cal. 244; *Harley* v. *Young*, 4 Cal. 284.

34. The statement on appeal must in all cases be signed by the judge, except when agreed to by the parties or their attorneys. *Harley* v. *Young*, 4 Cal. 284.

35. The affidavit of jurors will not be considered in a statement on appeal to contradict a verdict set out in the record. *Castro* v. *Gill*, 5 Cal. 42.

36. The object of the statement is to make record of that which before was not record, and which rests only in the recollection of the court, counsel or minutes of the clerk, and it is not necessary to embody mat-

ter of record in a bill of exceptions. *De Johnson* v. *Sepulbeda*, 5 Cal. 151.

37. If the record does not purport to set out all the testimony, but contains only a meager statement, the court will not determine whether the verdict was contrary to the evidence or not. *Samuels* v. *Gorham*, 5 Cal. 227; *Ford* v. *Holton*, 5 Cal. 327.

38. An affidavit of one of the attorneys as to the selection of the jury, although copied into the transcript, is no part of the record, and therefore cannot be noticed. *Magee* v. *Mokelumne Hill Co.*, 5 Cal. 359.

39. The notices and affidavits filed on an application to retax costs cannot be considered on appeal, if not embodied in a bill of exceptions or statement. *Gates* v. *Buckingham*, 4 Cal. 286.

40. Where the evidence is not set out in a bill of exceptions or other authentic form, the appellate court will not inquire into the correctness of instructions given by the court below, considered as abstract questions of law. *People* v. *Lafuente*, 6 Cal. 202.

41. In every criminal case the instructions given and refused should be so marked and signed by the judge, or they will not be considered on questions of error. *People* v. *Lockwood*, 6 Cal. 205.

42. The fact of the appellants having objected in the court below to the introduction of evidence of location of a school land warrant, on the ground that it was not recorded in the proper office, is not sufficient to justify the appellate court in presuming that such was the case, when the statement on appeal contains no evidence of the fact. *Nims* v. *Johnson*, 7 Cal. 112.

43. Where a statement to be used on appeal is not filed within twenty days after judgment it cannot be regarded, and the case will be determined on the judgment roll alone. *Macomber* v. *Chamberlain*, 8 Cal. 323.

44. The finding of the court need not be embodied in the statement or bill of exceptions. *Reynolds* v. *Harris*, 8 Cal. 618.

45. A judge can revoke his certificate to a settled statement on appeal during the term at which the judgment was rendered, but after the term has expired it cannot be done. *Branger* v. *Chevalier*, 9 Cal. 172.

46. Where the judge of the superior court certified to an engrossed statement, and subsequently revoked his certificate, and ordered the statement to be made conformable to this latter settlement, which order was not entered on record, and the judge of the fourth district court, to which the cause was transferred, ordered that the order of revocation and amendment be entered nunc pro tunc, there being no record evidence on which to base such an order: held to be error. *Ib.* 173.

47. Where the record in a criminal case states that it gives "in substance all that was proven on the part of the State," it is sufficient. The facts as proved being given, there is no necessity of setting forth the testimony. *People* v. *York*, 9 Cal. 422.

48. Instruments are sometimes admissible for one purpose and inadmissible for another; and when objected to, the grounds of the objection should be stated, and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken, otherwise they cannot be regarded. *Provost* v. *Piper*, 9 Cal. 553.

49. A statement on appeal is sufficient when the judge certifies that it is substantially correct. It is not necessary that the testimony should be stated in the precise words of each witness. *Battersby* v. *Abbott*, 9 Cal. 568.

50. It is no objection that the statement does not affirmatively show that the settlement was upon proper notice, or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts. *Ib.*

51. Where the court below excluded from the jury evidence of threats on the part of the deceased against the life of defendant, and the record does not show the character of such threats, the supreme court will presume that such proof was properly excluded. *People* v. *Glenn*, 10 Cal. 37.

52. Affidavits in support of a motion in the court below will not be considered on appeal, unless they are incorporated in the statement or bill of exceptions. *People* v. *Honshell*, 10 Cal. 86.

53. Where there is no statement on appeal, the supreme court is confined in its examination of the case to the judgment roll, and where that is regular, the judgment below will be affirmed. *Karth* v. *Orth*, 10 Cal. 193; *Lower* v. *Knox*, 10

Cal. 481; *American River W. and M. Co.* v. *Bear River W. and M. Co.*, 11 Cal. 340; *Mc Gill* v. *Rainaldi*, 11 Cal. 391; *Newberg* v. *Hewson*, 12 Cal. 280; *Burdge* v. *Gold Hill and Bear River W. Co.*, 15 Cal. 198; *Barrett* v. *Tewksbury*, 15 Cal. 357; *Reynolds* v. *Lawrence*, 15 Cal. 361; *Dobbins* v. *Dollarhide*, 15 Cal. 375.

54. By an assignment of errors as the term is used in the supreme court, is meant a specification of the errors upon which the appellant will rely with such fullness as to give aid to the court in the examination of the transcript. *Squires* v. *Foorman*, 10 Cal. 298.

55. Where a notice of motion to dismiss a complaint as specified grounds is given, to obtain a review of the order made on the motion the record must disclose the papers read or the evidence offered in their support. *Freeborn* v. *Glazer*, 10 Cal. 338.

56. On an appeal from an order made on affidavits filed no statement is necessary. The affidavits must be annexed to the order, in place of a statement, and the certificate of the clerk should specify the affidavits used, and to enable him to do so he should at the time mark them as filed on the motion. *Paine* v. *Linhill*, 10 Cal. 370.

57. Where a motion for new trial is denied, and the record contains the statement used on such motion, but no statement on appeal from the judgment, this court can only examine the action of the court below in denying the motion—the judgment cannot be reviewed except through the order made upon the motion, and from this order, no appeal having been taken, the case stands on the judgment roll. *Lower* v. *Knox*, 10 Cal. 481; *Burdge* v. *Gold Hill and Bear River W. Co.*, 15 Cal. 198.

58. A stipulation inserted in the transcript and not embodied in a statement or bill of exceptions, form no part of the record which the supreme court can notice. *Ritter* v. *Mason*, 11 Cal. 214.

59. Nor do affidavits used on motion to open the judgments form any part of the record where there is no certificate of the judge or clerk, or an admission of counsel that they were used for that purpose. *Ib.*

60. No errors can be assigned which the supreme court will notice on an instrument not embodied in a statement on appeal or a bill of exceptions. *Moore* v. *Semple*, 11 Cal. 361.

61. Where there is no properly authenticated statement on appeal: held, that the special verdict of the jury is conclusive of the facts found. *Newberg* v. *Hewson*, 12 Cal. 280.

62. A statement on appeal must be filed within the time prescribed by law. A statement filed a year after judgment was rendered is not in time. *Heihn* v. *Stansbury*, 12 Cal. 412.

63. Instructions to a jury which are not embodied in the statement on appeal or bill of exceptions, and are neither certified to by the judge trying the cause or signed by him, cannot be the subject of consideration by this court. *Paige* v. *O'Neal*, 12 Cal. 492.

64. Transcripts on appeal to this court should not contain irrelevant or unnecessary matter. Instead of copying into a statement for a new trial, or on an appeal, deeds and transcripts of records, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose, and is all that the code requires. *Knowles* v. *Inches*, 12 Cal. 214.

65. A statement on appeal to be regarded must be entire, and statements and exceptions should be speedily settled. *Hutchinson* v. *Bours*, 13 Cal. 52.

66. The supreme court cannot receive evidence otherwise than through the statement or the record. *Vischer* v. *Webster*, 13 Cal. 60.

67. A clerk's certificate that a statement is the same which was used on motion for a new trial is entitled to no weight, as the clerk is not authorized by law to verify a statement in that form. *Fee* v. *Starr*, 13 Cal. 170.

68. A stipulation to the effect that a statement may "be used on the motion for new trial in this cause, and also on the appeal to the supreme court," includes an appeal from the judgment as well as an appeal upon the decision of the motion for a new trial. *Hastings* v. *Halleck*, 13 Cal. 207.

69. The supreme court will not inquire into objections as to the misjoinder of parties, unless it was taken in the court below, and this fact appear in the statement. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 13 Cal. 238.

70. Where there is no bill of exceptions and no statement, the rulings of the court upon questions of law during the trial cannot be sought from the testimony as taken down by the clerk, neither under the code of 1850 nor 1851. *Castro* v. *Armesti*, 14 Cal. 38.

71. A reference in the statement on appeal to the evidence as taken by the clerk with the consent of parties is sufficient, the evidence being in the transcript. The statement need not contain the evidence. *Darst* v. *Rush*, 14 Cal. 84.

72. A statement on appeal, certified by the judge to be correct, according to his recollection, is not sufficient. *Van Pelt* v. *Littler*, 14 Cal. 196.

73. In criminal cases the statute requiring a statement or bill of exceptions to be made within ten days after the trial is directory, and the defendant is not precluded of his rights by failure of the judge to settle or sign the statement within the time. *People* v. *Woppner*, 14 Cal. 437; *People* v. *Lee*, 14 Cal. 510.

74. But defendant must prepare and tender his statement or bill within ten days, or such further time as may be granted by the district judge or a judge of the supreme court, or give sufficient excuse for his failure so to do. Such excuse being shown, the bill should be signed, otherwise not. *Ib.* 511.

75. The supreme court will not inquire into the reasons which induced the district judge to sign the bill after the statutory period, but will presume they were sufficient. *Ib.* 512.

76. The statement and bill of exceptions in the statute on this subject mean the same thing. *Ib.* 514.

77. When the judge cannot be found, the proposed statement or bill in a criminal case may be delivered to the clerk of the court for him—the clerk's office being the proper place for the deposit of papers for the judge in his absence from his chambers. The clerk should minute on the document the date of its receipt, and hand it to the judge at the earliest convenient opportunity. *Ib.*

78. Where judgment was rendered July 27th, 1859, and motion for new trial overruled October 22d, 1859, a statement on appeal served November 10th, 1859, was not in time. *Mahoney* v. *Caperton*, 15 Cal. 315.

79. A statement on appeal must specify the grounds on which the appellant relies. The questions of law and fact raised must be distinctly set forth, accompanied with only so much of the evidence as may be necessary to show their pertinency and materiality. *Barrett* v. *Tewksbury*, 15 Cal. 356.

80. There is no distinction as to the manner in which a statement is to be prepared between a case at law and a case in equity. The grounds of appeal must in both cases be stated; and in both cases much, if not the greater portion, of the evidence will be immaterial for the determination of these grounds in the supreme court. *Ib.* 357.

81. In criminal cases, if the instructions to the jury are erroneous under any and every state of facts, the supreme court will review them, even though there be no statement of facts—because it necessarily appears that the court erred to the prejudice of defendant. *People* v. *Levison*, 16 Cal. 100.

82. But where the instruction *may be* correct under any state of facts, then the supreme court presumes in favor of the judgment below, and will not reverse it when there is no statement of facts or bill of exceptions—because the appellant must show affirmative error. *Ib.*

83. Where the record shows simply a statement signed by the district judge, without any certificate preceding as to the correctness of the statement, and it does not purport to be a statement on motion for new trial, and no order appears disposing of the motion for new trial: held, that there is no statement on motion for new trial or on appeal. And the grounds of the motion for new trial not being filed within the time required by law, the appeal is from the judgment alone. *Mc Cartney* v. *Fitz Henry*, 16 Cal. 185.

IV. Amendment to a Statement.

84. The certificate of a judge is a sufficient authentication of a statement, and where a party does not think proper to file amendments, or the judge to correct the statement, the certificate of that fact by the judge is all that is necessary. *Redman* v. *Gulnac*, 5 Cal. 148.

85. While the term lasts, the court has power to amend the record; after the term has passed, the record cannot be amended unless there is something in the record to amend by. The settled statement until certified is not record. *Branger* v. *Chevalier*, 9 Cal. 172.

86. Where amendments are made to a statement on appeal, a fair copy of the statement as amended should be made; otherwise the supreme court will not look into it. *Marlow* v. *Marsh*, 9 Cal. 259; *People* v. *Edwards*, 9 Cal. 291; *Skillman* v. *Riley*, 10 Cal. 300.

87. A statement agreed on by parties should not probably be amended by the court on motion, unless under a very clear showing of mistake or fraud. *Hutchinson* v. *Bours*, 13 Cal. 52.

88. A statement on motion for a new trial regularly settled and signed by the judge, and containing all the grounds of the motion, but without any specification thereof, may be amended by the judge so as to insert a specification of the grounds of the motion, after the time for filing a statement has passed. *Valentine* v. *Stewart*, 15 Cal. 396.

STATUTE OF FRAUDS.

In general.

1. A plaintiff's recovery cannot be barred by the statute of frauds, unless the statute be pleaded. *Osborne* v. *Endicott*, 6 Cal. 153.

2. In order to create a trust in land, the facts need not appear affirmatively upon the face of the deed, but may be proved by any note or memorandum in writing of the nominal purchaser, even though he plead the statute of frauds. *Ib.*

II. Sale of Lands.

3. A mere parol agreement for the conveyance of land made before the adoption of the common law and the reënactment of the statute of frauds in this State is void, there being neither delivery of possession nor of title deed, and no part payment of the purchase money. *Harris* v. *Brown*, 1 Cal. 100.

4. A specific performance of a contract for the conveyance of land can be enforced only when the contract is in writing, or where there has been a part performance of a verbal contract of the vendee. *Hoen* v. *Simmons*, 1 Cal. 121.

5. Where the terms of a verbal contract are reduced to writing, but the written paper is neither signed nor delivered, the contract will be deemed inchoate and incomplete, and neither party will be bound by it. *Ib.*

6. A party who seeks a specific performance of a verbal contract for the conveyance of real estate, should show that he has fully complied with the substance of the contract on his part. *Ib.*

7. An agreement for the conveyance of land resting solely in parol is void by the Mexican law, except perhaps in the case of an executed contract where corporeal possession was delivered at the very time of the sale by actual entry upon the premises, and the doing certain acts analogous to the livery of seizin at common law. *Ib.*

8. A certificate in writing in these words, "and I did at the time of the said agreement" (to convey land) "consent and agree that A should have possession of the lot forthwith," executed long after the agreement, forms no part of the original contract and wants consideration, and an action cannot be maintained for damages because a third person is in possession. *Tewksbury* v. *Laffan*, 1 Cal. 130.

9. A parol promise to pay for the improvements made upon land is not within the statute of frauds. *Godeffroy* v. *Caldwell*, 2 Cal. 492.

10. A conveyance that would come within the statute of frauds if made by an individual, would be liable to the same construction if made by a corporation. *Smith* v. *Morse*, 2 Cal. 539.

11. A lease executed for two years by the agent of the lessors to the lessees, but

who had no written authority to do so, is within the statute of frauds. *Folsom* v. *Perrin*, 2 Cal. 604.

12. An unwritten contract for the sale of land is void by the statute of frauds, and courts of equity have no power to enforce a specific performance. *Abell* v. *Calderwood*, 4 Cal. 91.

13. An executed parol agreement is a good defense against an action upon a specialty. The statute of frauds contains no provision with regard to the dissolution of agreements or contracts under seal for the sale of lands. *Beach* v. *Covillaud*, 4 Cal. 316.

14. A sale of land at auction, where no note or memorandum is made by the auctioneer, and no writing exists between the parties, is void by the statute of frauds. *People* v. *White*, 6 Cal. 75.

15. No eviction is necessary to enable a vendor to recover back the purchase money of real estate where the sale was void under the statute of frauds. *Reynolds* v. *Harris*, 9 Cal. 340.

16. Where a verbal contract was alleged in the bill, and admitted in the answer, without the defendants insisting upon the statute, a specific performance was decreed and the obvious grounds that the admission of the contract took the case out of the mischiefs against which the statute was intended to guard, and the failure to insist upon the statute was a waiver of its protection. *Arguello* v. *Edinger*, 10 Cal. 158.

17. Where a verbal contract had been so far performed by one of the parties, relying upon the good faith of the other, that he could have no adequate remedy except by complete performance, courts of equity decreed its execution, upon the ground that the refusal to execute the same under such circumstances was a fraud, and that a statute having for its object the prevention of fraud, could not be used as an instrument for its perpetration. *Ib.*

18. Eminent judges have at different times questioned the wisdom of allowing exceptions to the statute, and have declared their intention not to extend them beyond the established precedents; but none have gone so far as to deny the power of a court of equity to grant relief in a clear case where the refusal to complete the contract would operate as a fraud upon the purchaser. *Ib.*

19. Nothing can be regarded as a part performance to take the case out of the operation of the statute, which does not place the party in a situation which is a fraud upon him, unless the contract be executed. *Ib.*

See LANDS, SALE, SPECIFIC PERFORMANCE.

III. SALE OF PERSONAL PROPERTY.

20. Where the defense to an action is that there was no contract in writing of the sale, but the evidence given at the trial did not appear to be fully returned, and there appeared to have been no objection raised, or exception taken to the insufficiency of the evidence, the appellate court will presume that the evidence was sufficient to warrant the verdict. *Bunting* v. *Beideman*, 1 Cal. 182.

21. Where there is no note or memorandum of the contract in writing, and no part of the purchase money paid, without an acceptance or receipt of the goods, the contract is void, and cannot be enforced. *Gardet* v. *Belknap*, 1 Cal. 400.

22. The memorandum required by the statute to be entered by an auctioneer in his sale book, must be made at the very time of the sale, or the vendee will not be bound by the contract, and a memorandum made in the afternoon of the same, or the morning of the next day, is insufficient. *Craig* v. *Godfrey*, 1 Cal. 415.

23. Where a sale of personal property is void as to the subsequent purchasers, must be determined under the fifteenth section of the statute of frauds. *Vance* v. *Boynton*, 8 Cal. 560.

See SALE.

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1. *Change of Possession.*

24. The continued change of possession required by the statute after a sale of goods and chattels in order to validate the sale, must be actual and not constructive. *Fitzgerald* v. *Gorham*, 4 Cal. 290.

25. In order to constitute a valid sale of personal property against creditors, there must be according to the statute of this State, an immediate delivery thereof,

accompanied by an actual and continued change of possession. *Samuels* v. *Gorham*, 5 Cal. 227.

26. By an immediate change of possession is not meant a delivery instanter, but the character of the property sold, its situation and all the circumstances must be taken into consideration in determining whether there was a delivery within a reasonable time, so as to meet the requirements of the statute, and this will often be a question of fact for the jury. *Ib.*

27. If the mortgagee took immediate and actual possession of the property in the absence of any contract concurrent or subsequent to the mortgage, conferring any greater authority than that contained in the mortgage, he cannot claim by virtue of such possession, because the covenants of the mortgage show that he was not entitled to such possession. *Meyer* v. *Gorham*, 5 Cal. 324.

28. The plaintiff purchased from B. a certain number of cattle, and presented to C., the agent of B., an order for their delivery. C. pointed out the cattle to the plaintiff, as they were grazing in view, and told him that he delivered him possession, and then accepted an offer of employment from the plaintiffs, and remained in charge of the cattle until they were seized by the defendant: held, that this was a delivery as immediate and as complete as the nature of the case would admit, and followed by an actual and continued change of possession. *Montgomery* v. *Hunt*, 5 Cal. 369.

29. Where the goods of a third party are mixed with the property or in the apparent possession of the judgment debtor, the sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay or refusal to deliver. *Daumiel* v. *Gorham*, 6 Cal. 44; *Taylor* v. *Seymour*, 6 Cal. 543.

30. Where A had a large quantity of flour stored in the warehouse of B, and sold a portion of it to C, and gave an order for the flour sold on B, who accepted the same, and gave C in exchange a receipt for the same, and transferred it on his warehouse books to the account of C, but did not separate any specific portion from the flour of A as the property of B, and the whole was subsequently seized in an action against A: held, that the sheriff was not liable to C in the absence of segregation of the flour, but that B was estopped by his receipt from denying his liability. *Adams* v. *Gorham*, 6 Cal. 71.

31. Where the plaintiffs bought a certain amount of flour, being part of a large quantity on storage belonging to the vendor, and the plaintiff did not remove the flour purchased, nor separate from the remainder, but the vendor subsequently sold the remainder, and more, to other parties, who removed what they purchased, leaving on storage a less amount than had been purchased by plaintiff, which was afterwards attached in a suit against plaintiff's vendor: held, that the sale and removal of all the flour except that bought by plaintiff was a segregation of plaintiff's flour, vesting in him a clear title at the time of the seizure. *Horr* v. *Barker*, 6 Cal. 496.

32. Growing crops are not goods or chattels within the meaning of the statute of frauds, and will pass by deed or conveyance from the very necessity of the case, as they are not susceptible of manual delivery until harvested and reduced to actual possession. *Bours* v. *Webster*, 6 Cal. 664.

33. The absence of any fraudulent intent will not take the case out of the statute. There must be an actual and continued change of possession or the sale is void as to creditors. *Stewart* v. *Scannell*, 8 Cal. 83; *Mitchell* v. *Steelman*, 8 Cal. 375; *Whitney* v. *Stark*, 8 Cal. 515.

34. Where A, the owner of a sea-going vessel, executes to B a mortgage thereon which is recorded in the custom house of her home port. B. commences suit to foreclose the mortgage and makes C a party defendant thereto, on the ground that he purchased the vessel subject to the plaintiff's mortgage. C, in his defense, avers that the mortgage was void under the statute of frauds, and that he now held the vessel discharged from the same: held, that the mortgage was a valid lien, and that the record of a mortgage was sufficient notice thereof to C. *Mitchell* v. *Steelman*, 8 Cal. 370.

35. Where notice of a mortgage is had by a subsequent purchaser or mortgagor, he is not protected by our statute of frauds. *Ib.* 375.

36. The question of delivery and change of possession is a mixed question of law

and fact; but as to what shall constitute a delivery is a question of law alone. *Vance* v. *Boynton*, 8 Cal. 561.

37. Where H., the owner of barley, which he had piled up in his corral, sells five hundred sacks thereof to V., who has it separated, marked V., and piled up in another part of the corral, and employs a third person to take care of the same for him, and H. afterward sells and delivers the same to B.: held, that B. was entitled to the property, the sale from H. to V. not being followed by an actual and continued change of possession. *Ib.*

38. Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on the warehouseman, which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on his books charging the vendor and creditor, the purchasers, with their respective lots: held, that there was a sufficient delivery of possession without a separation of the various lots. *Horr* v. *Barker*, 8 Cal. 608.

39. Where the vendor only sells a part of goods on storage, those sold, if all together and of the same mark, must be separated from the larger mass in order to change the possession; but where all the goods of the vendor in the hands of a third party are sold, the change of possession is complete by delivery of the order, taking a new receipt, and entry of the transaction on the books of the warehouseman. *Ib.*

40. A delivery of a warehouse receipt stating that the goods named therein are deliverable on return of the receipt is sufficient prima facie to pass the title. There is no substantial difference in this respect between a warehouse receipt and a bill of lading. *Ib.* 614.

41. The change of possession of the property sold must be continued. The statute does not fix any limits when this change may cease, and if courts could put limits to it they could do away with the clear language of the law. *Bacon* v. *Scannell*, 9 Cal. 273. See *Stevens* v. *Irwin*, 15 Cal. 507.

42. F. sold and delivered to V. P. certain goods, the possession of which V. P. retained for two or three days, when he leased the premises in which the goods were and delivered the goods to F., his vendor, and one M., who, after carrying on the business, in connection with F., for a few days, retired, leaving F. in the exclusive possession of the property, which possession continued until the goods were seized by L., as a constable, under an execution against F.: held, that the sale of the goods to V. P. was void as to creditors, and the goods were subject to the execution against F. *Van Pelt* v. *Littler*, 10 Cal. 394.

43. In the fall of 1856, L. rented of W. a portion of his brick yard, for the purpose of making bricks. L. subsequently made a brick kiln of bricks and left them in W.'s charge and possession for him to sell for L.'s benefit. In January, 1857, L. made and delivered a bill of sale of the bricks to R. and informed W. of the same, but there was no change of possession under the bill of sale. S., the defendant, as constable, seized the bricks under a process against L. and sold them as the property of L.: held, that L.'s sale to R. was a fraud as against the creditors of L., and that defendant was justifiable in taking the bricks and selling the same. *Richards* v. *Schroeder*, 10 Cal. 434.

44. K. & S. were the owners of a mule team, which they used in hauling quartz rock to their quartz mill—the team was driven by one L., an employé. K. & S. sold the team to H., executing a bill of sale, and delivering the team by the discharge of L., the driver, who was immediately employed by H., and saying to H., "There is the team." K. & S. then hired of H. the team for eight dollars per day, and put it in the same business of hauling quartz rock as before, and with L., the same driver. Team was kept and fed at K. & S's stable, as before the sale: held, that there was no such actual and continued change in the possession of the property, as to take the case out of the operation of the statute. *Hurlburt* v. *Bogardus*, 10 Cal. 519.

45. When A has six hundred barrels of flour on storage, and he sells to B one hundred, to C two hundred, to D three hundred, and gives each a delivery order upon his warehouseman, and the purchasers all surrender their several orders to the warehouseman without making any separation of each lot from the common mass, but voluntarily leave the flour standing

on the books of the warehouseman to the credit of each purchaser for his proper number of barrels, it is a complete delivery to each purchaser, and will pass the title to each. *Horr* v. *Barker*, 11 Cal. 403.

46. The separation by the purchasers of their various lots is a mere matter of convenience among themselves, not affecting their rights as to their vendor or a mere trespasser. *Ib.*

47. The statute only requires an actual and continued change of possession as a protection against creditors and subsequent purchasers of the vendor. *Paige* v. *O'Neal*, 12 Cal. 495.

48. The Uncle Sam Mining Company execute a mortgage upon their mining claims to R., a director of the company. The mortgage was in fact in trust to secure F., et als., who had as sureties of R. signed with him a joint and several note to D., for money loaned by him to R. The money was for the company. R. assigns this mortgage to F. to secure him against liability on the note, delivering the mortgage at the same time to F., who retained it a few minutes and returned it to R. to receive the interest from the company, as agent for him, F. The note is unpaid; R. owes the company nothing: held, that after the assignment, R. had no interest in the mortgage which a judgment creditor could reach; that the delivery of the mortgage to R. for the purpose of collecting interest, there being no circumstance of fraud or suspicion, did not impair the rights of the assignee; that the liability of F., et als., as sureties, was a sufficient consideration for the assignment, and that such an assignment is not a mortgage of a mortgage. *Hall* v. *Redding*, 13 Cal. 220.

49. The doctrine of continuous possession of personal property after sale or mortgage, does not apply to the case of a paper the mere evidence of debt. *Ib.*

50. Action against the sheriff for seizing plaintiff's wheat, as the property of one Audeque. Evidence tending to show that the wheat was grown on the land of plaintiff and in his possession; that A. was on the land only to raise and harvest the crop; that the grain was cut and stacked on the premises; that plaintiff was entitled to one-third by the contract between him and A.: that A. sold to plaintiff and delivered possession, and then abandoned the premises, plaintiff residing thereon. A. took no further control of premises or crops, and plaintiff assumed entire dominion of both: held, that plaintiff was not bound to abandon his premises and carry the grain beyond them to protect his title against creditors of A. That there was no error in refusing to instruct the jury that there was no evidence that the sale from A. to plaintiff was accompanied by an immediate delivery of the property, and followed by an actual and continued change of possession thereof. *Pacheco* v. *Hunsacker*, 14 Cal. 124.

51. Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received the dust coined, and a creditor of C. attached the coin by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin: held, that plaintiff was entitled to the coin; that the dust in defendant's hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin and divided among the owners; that C.'s right in the dust was a chose in action, which he could assign by order in favor of the purchaser or assignee, and after such order, neither C. nor his creditors could claim any right to the money; that the statute of frauds has no application to a case like this. *Walling* v. *Miller*, 15 Cal. 40.

52. Where a vendee of personal property buys it bona fide, takes possession openly, and holds it in exclusive possession for a year or more, afterwards puts the property into the possession of the vendor, as attorney in fact of the vendee, this qualified possession of the vendor does not, as matter of law, show the sale to be fraudulent, and void as against the creditors of the vendor. *Stevens* v. *Irwin*, 15 Cal. 504.

53. Our statute of frauds (act of 1859, section fifteen) was not intended to go beyond the extreme rule adopted by the su-

preme court of the United States and the English courts, to wit: that retention of the possession of personal property by the vendor, after an absolute sale, is per se fraud. The word "actual" in the statute was designated simply to exclude a mere formal change of possession, and the word "continued" to exclude a mere temporary change. But the statute does not require that the vendor, under penalty of forfeiture of the goods, shall never have any control over or care of them. *Ib.* 505.

54. All the statute requires is, that delivery must be made; the vendee must take *actual* possession; the possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. The possession must be continuous—not taken to be surrendered back again—not formal, but substantial. But it need not necessarily continue indefinitely, when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement of the status of the property, and the claim to it by the vendee. *Ib.* 506.

55. The facts in *Bacon* v. *Scannell*, 9 Cal. 272, differ from those here; but the principle announced in that case is not law. *Ib.* 507.

56. Plaintiff sues for damages in levying on fruit trees shipped by him to W., and landed to W.'s order on the wharf at Stockton, claiming that the trees were not paid for, and not subject to W.'s debts, for want of delivery, and asked, on the trial, this instruction: "That a man who is insolvent for the want of means to pay his debts in this State, is in law insolvent, without reference to any property in another State;" held, that the proposition is too broadly asserted, even if there were any proof on which it could rest—but in this case there is no proof of the insolvency of W. *Thompson* v. *Paige*, 16 Cal. 79.

57. Plaintiff also asked this instruction: "That a delivery at the wharf is not sufficient, unless notice be previously given to the vendee of their arrival, and that sufficient time be allowed to enable him to receive and remove them:" held, that this proposition is not strictly correct; that if the trees bargained for were put out on the wharf, marked for W., with the intention of his taking them, and if this were done by his order, they would vest in him, especially if he was willing to consider this a good delivery; that there is in the testimony here no predicate laid for the doctrine of stoppage in transitu, or that plaintiff claimed the right to stop the trees. *Ib.*

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2. *Delivery.*

58. Words alone, unaccompanied by acts, cannot make out a delivery to take the case out of the statute. *Gardet* v. *Belknap*, 1 Cal. 402.

59. Where an arbitrator refuses to deliver an award made by him until his fees are paid, and a promise to pay is made and he delivers his award, it takes the case out of the statute, and the undertaking to pay a reasonable compensation is supported by a sufficient consideration. *Young* v. *Starkey*, 1 Cal. 427.

60. A sale of personal property, unaccompanied by immediate delivery, is void as to creditors, and this though delivery be made before levy is made by the creditors. *Chenery* v. *Palmer*, 6 Cal. 122.

61. And where such sale is absolute in terms, but with an understanding between vendor and vendee that it was only to operate as a mortgage, there it is a secret trust as to the surplus and void as to creditors. *Ib.*

62. Where a sale or mortgage of personal property was void for want of immediate delivery, subsequent advances after delivery cannot be recovered, where it appears that they were paid under the general contract. The contract being void, all subsequent acts relate to its inception, and are alike tainted with fraud. *Ib.*

63. Where the plaintiff sold a number of bales of drillings to A for the purpose of making sacks, delivered to A as fast as he needed them for manufacturing, and A agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking the sacks as he should make his payments: held, that upon the delivery of the drills to A, the title thereto vested in him, and that plaintiff had no lien thereon or on the sacks until they were delivered to him. *Hewlett* v. *Flint*, 7 Cal. 265.

64. A sale of merchandise by bill of sale, the goods remaining in the possession of the vendors, as warehousemen, at a reg-

ular charge, and their receipt given for the goods on storage, the vendors doing business as commission merchants, and sometimes receiving goods on storage, is void as to the creditors of the vendors. *Stewart* v. *Scannell*, 8 Cal. 83.

IV. Consideration.

65. Where the consideration of a contract is expressed in writing, although fictitious, it satisfies the statute of frauds, and if the consideration is not paid, that fact may be urged specially as a good ground of defense. *Hoppe* v. *Stout*, 2 Cal. 462.

66. A guarantor on a promissory note is not within the statute of frauds, for the want of a consideration expressed in writing, as the contract imports a consideration, and each one who writes his name upon it is a party to it and an original undertaker. *Riggs* v. *Waldo*, 2 Cal. 487.

67. The statute requires a written agreement to answer for the debt of another to express the consideration upon which it is made; but where the agreement is executed at the same time as the lease, and forms the consideration for the execution, it is not a promise to answer for the debt of another, but must be considered as an original undertaking, and as a promise made, upon the strength of which another was enabled at the time to obtain possession of property and enjoy its use. *Evoy* v. *Tewksbury*, 5 Cal. 285.

68. A guaranty not under seal, nor expressing consideration, made cotemporaneously with the contract guaranteed, is a part of that contract, and the expression of the consideration in the contract takes the guaranty out of the statute of frauds. *Jones* v. *Post*, 6 Cal. 104.

69. Where the complaint charged that A was indebted to the plaintiff, and had conveyed his property to B to be disposed of for his benefit, and had drawn an order in favor of plaintiff on B, who had accepted it, and further charged that B had subsequently reconveyed a portion of the property to A without consideration, praying that B be compelled to execute the trust in favor of plaintiff: held, that A was a proper and necessary party to the action, and that the order of A on B is not void by the statute of frauds. The conveyance by the former to the latter was a sufficient consideration to support their promise. *Lucas* v. *Payne*, 7 Cal. 96.

70. There is no conclusion of fraud springing from the want of consideration in a deed, which will enable a stranger to attack it, though it is a circumstance, among others, from which fraud may be inferred. *Gillan* v. *Metcalf*, 7 Cal. 139.

71. A guaranty endorsed on a charter party at the same time with its execution, and the consideration of one being in fact the consideration of the other, and being in these words: "I hereby guarantee the fulfillment of the within charter, on the part of the charterer," is good. *Hazeltine* v. *Larco*, 7 Cal. 33.

72. The instrument referred to in the guaranty becomes part thereof. If the guaranty were executed subsequently it would fail, for there is either no consideration for the promise in fact, or the new consideration is not expressed in the instrument referred to. *Ib.* 34.

73. Where the court below, sitting as a jury, found that a sale was not made in good faith, and was without consideration, but failed to find as a fact a fraudulent intent, and entered judgment accordingly in favor of a subsequent purchaser: held to be error. *Gillan* v. *Metcalf*, 7 Cal. 139.

74. Where defendant entered into a contract with a builder for the construction of a brick house, and the builder applied to the plaintiffs, who were proprietors of a brick yard, for the sale of the necessary brick, and the defendant said to the proprietors to induce the sale, that he would become responsible for all the brick furnished his building, and whatever contract or agreement was made with the builder he would see carried out, or would pay for the brick if the builder would not: held, that the promise of defendant was within the statute of frauds. *Clay* v. *Walton*, 9 Cal. 333.

75. Whenever the leading object of the promisor is not to become surety or guarantor of another, but to subserve some interest of his own, his promise is not within the statute, although the effect of the promise may be to pay the debt or discharge the obligation of another. *Ib.* 334.

76. The provision of the statute of frauds which requires the promise to pay the debt of another to be in writing, expressing the consideration, does not apply

to the promise of A to pay money he owes by contract with B to C. This is paying A's own debt, and creating his own obligation, not assuming another's. *Barringer* v. *Warden*, 12 Cal. 314.

77. Where A, who is indebted to B, promises in consideration of his release, to B, to pay the amount to C who is a party to the arrangement, it is a sufficient consideration to support such promise. *Ib.*

78. It is essential to the validity of a contract to answer for the debt or default of another, that it or some note or memorandum thereof be in writing, that it expresses the consideration, and that it be subscribed by the party to be charged thereby. *Ellison* v. *Jackson Water Co.*, 12 Cal. 552.

79. A promise by B. to perform J. W.'s contract could furnish no consideration for a promise from E., nor could the consideration of the original contract attach to the subsequent promise of B. *Ib.*

STATUTE OF LIMITATION.

See LIMITATION.

STATUTORY CONSTRUCTION.

See CONSTRUCTION OF STATUTES.

STAY OF PROCEEDINGS.

1. If the appellants have been guilty of no laches in perfecting their appeal, the court may enlarge the time for them to file their bond to entitle them to a stay of proceedings under the statute, and in the mean time order a stay of all proceedings in the inferior court until the extended period shall have expired; in such case the court may impose such terms as shall appear to be proper. *Bradley* v. *Hall*, 1 Cal. 199.

2. It seems that an appeal from an order of reference does stay the proceedings. *Smith* v. *Pollock*, 2 Cal. 92.

3. A stay of proceedings from its nature under an appeal, only operates upon orders, or judgments commanding some act to be done, and does not reach a case of injunction. *Merced Mining Co.* v. *Fremont*, 7 Cal. 132.

4. An injunction is not dissolved or superseded by appeal taken. *Ib.*

5. A justice of the peace has jurisdiction to grant appeals and stay proceedings thereupon, and his action cannot be reviewed on certiorari. *Coulter* v. *Stark*, 7 Cal. 245.

6. Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for a new trial. A stay of proceedings under the judgment will fully protect the losing party. *Hutchinson* v. *Bours*, 13 Cal. 52.

7. The stay of proceedings granted according to the statute on the execution of the undertaking an appeal is a sufficient consideration thereof. *Dore* v. *Covey*, 13 Cal. 508.

8. It is only of orders or judgments which command or permit acts to be done, that a stay of proceedings on appeal can be had. *Hicks* v. *Michael*, 15 Cal. 109.

STEAMERS.

See VESSELS.

STIPULATION.

1. A stipulation that a verdict should be entered in favor of the defendants, reserv-

ing to the plaintiffs the same rights which he would have had in case a jury had been called and a verdict actually rendered for the defendants, should be regarded in precisely the same light as a verdict, and be followed by the same legal results. *Suñol* v. *Hepburn*, 1 Cal. 258.

2. Where the court orders a new trial, unless the judgment creditor stipulates to remit a part of the verdict and the judgment creditor acquiesces and files the remittitur, he raises a right to question the verdict. *George* v. *Law*, 1 Cal. 365.

3. Where a written stipulation is filed by the parties in the court below to govern the proceedings there, but has not been brought to the notice of the court for its adjudication, the appellate court will not regard it. *Clarke* v. *Forshay*, 3 Cal. 291.

4. If the appellant has been injured by a disregard of the stipulation, his remedy must first be sought in the court in which it is filed, or in some court of original jurisdiction. *Ib.*

5. Where one of the issues was the condition of the goods when they left New York, and defendant stipulated on the trial that "if merchantable when they left New York, he made no claim," it was held that he was concluded by the admission. *Burritt* v. *Gibson*, 3 Cal. 399.

6. Where counsel in a cause pending in the supreme court stipulate to submit the case to the court, on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation, and insist on such points other than those mentioned in the stipulation. *Cahoon* v. *Levy*, 10 Cal. 217.

7. Counsel in the trial of a cause cannot object that the court did not render judgment on the special verdict of the jury, where they have stipulated that such additional facts may be found by the judge, as would, in his judgment, be sufficient to present all the questions raised by the pleadings. *Marius* v. *Bicknell*, 10 Cal. 224.

8. A stipulation inserted in the transcript on appeal, and not embodied in a statement or bill of exceptions, forms no part of the record which this court can notice. *Ritter* v. *Mason*, 11 Cal. 214.

9. When parties in the court below stipulate that a motion for a new trial should be denied, they cannot question on appeal the correctness of an order denying such motion. *Brotherton* v. *Hart*, 11 Cal. 405.

10. The supreme court will not examine errors assigned on appeal, where, after the service of notice of appeal, the parties stipulated that all errors in the record, referee's report, decree and judgment, were waived. *Glotzback* v. *Foster*, 11 Cal. 37.

11. A stipulation to the effect that a statement may "be used on the motion for new trial in this cause, and also on appeal to the supreme court," includes an appeal from the judgment as well as an appeal upon the decision of the motion for a new trial. *Hastings* v. *Halleck*, 13 Cal. 207.

12. A stipulation in the supreme court, that a cause be continued for the term, and that any motion may be made therein at the next term by either party, which might have been made at the first term after the filing of the transcript, covers only the rights of a party had at the time of the stipulation, and not those already lapsed by the laches of the party. *Reynolds* v. *Lawrence*, 15 Cal. 361.

13. Parties here have no unqualified right to stipulate for the abrogation of rules prescribed by the supreme court. *Ib.*

STOLEN GOODS.

1. An auctioneer who in the course of regular business receives and sells stolen goods, and pays over the proceeds of sale to the felon without notice that the goods were stolen, is not liable to the true owner for a conversion. *Rogers* v. *Huie*, 2 Cal. 571; overruling *Rogers* v. *Huie*, 1 Cal. 433.

2. Where the defendants were sureties for the appearance of one H., charged with the crime of receiving two mules alleged to be stolen, and the indictment was found against H. for "receiving stolen goods:" held, that it does not follow from this general description of the indictment that it was for the same crime mentioned in the recognizance. *People* v. *Hunter*, 10 Cal. 503.

3. Warrants drawn by the controller of State, delivered to the payees thereof, and

by them endorsed in blank, were presented by the holders to the State treasurer, and on payment were delivered to him. They were afterwards stolen from the office of the treasurer. The warrants on their face indicating a just and legal claim against the State, came into the hands of defendants, ignorant that they had been stolen. Defendants present them to the treasurer, and in lieu thereof receive State bonds payable to bearer, under the funding act of 1857, and part with them. The State sues for the bonds or their value: held, that the action does not lie; that defendants having received the bonds bona fide and without fraud, for warrants apparently good against the State, are not liable in this form of action. *State of California* v. *Wells*, 15 Cal. 340.

4. On trial under an indictment for receiving stolen goods, the court instructed the jury "That a guilty knowledge, on the part of the defendant, is essential to the constitution of the offense. This may be shown either directly, by the evidence of the principal offender, or circumstantially, by proving that the defendant bought them very much under their value, or denied their being in his possession, or the like:" held, that the charge is erroneous in this, that it asserts as a conclusion of law, that if the defendant purchased the goods at a price much below their value, *or* if he denied that he had them, *or* if the thief swore defendant received them, then, in either case, the guilty knowledge was proved; that this is not law; that either one of these facts is a circumstance of guilt, but does not alone constitute conclusive proof of guilt. *People* v. *Levison*, 16 Cal. 99.

See LARCENY.

STREETS AND HIGHWAYS.

I. IN GENERAL.

1. Taking a part of a lot from an individual for the purpose of a public street, though it may perhaps give him a claim on the public for compensation, does not confer upon him the right to encroach to the same extent on the land of his neighbor. *Reynolds* v. *West*, 1 Cal. 329.

2. Whether driving piles in a street extended into the bay in the city of San Francisco is an obstruction to the free use of the street by the public, is a question of fact for the jury to pass upon, and if not so submitted a new trial will not be granted. *City of San Francisco* v. *Clark*, 1 Cal. 386.

3. Every individual should not be permitted to determine for himself whether the grade of a street or a wharf is too high or too low, and set about altering it at his pleasure. *Clark* v. *Mc Carthy*, 1 Cal. 454.

4. An assessment was laid for the purpose of improving a street, and thereby benefiting the property of the plaintiiff in common with the property of other persons owning lots on the same street, and after the work was completed and all the benefit possible derived therefrom, the plaintiff cannot claim to be exempt from the assessment on the ground of irregularities in the mode of making the assessment. *Weber* v. *City of San Francisco*, 1 Cal. 457.

5. All that part of a bay or river below low water mark at low tide, is a public highway common to all citizens, and no one has a right to appropriate the use to himself solely. *Gunter* v. *Geary*, 1 Cal. 468.

6. It is a public nuisance to erect a house in a highway. *Ib.*

7. The city of San Francisco could not take property in the possession of another for the purpose of a public slip, without paying an adequate compensation, where the title is not in the city. *Ib.*

8. Where lots were sold as fronting on or bounded by a certain space designated in the conveyance as a street, the use of such space as a street passes as appurtenant to the grant and constitutes a dedication of such street, and it cannot afterwards be sold or disposed of to alter or defeat such dedication. *Breed* v. *Cunningham*, 2 Cal. 368.

9. Where the streets of a city are diverted from their ordinary and legitimate uses by special license to a private person, for his own benefit, as to run a railroad there, in the pursuit of a business which involves constant risk and danger, he is

bound in the exercise of such right to use extraordinary care. In this a private railroad differs from a public one. *Wilson* v. *Cunningham*, 3 Cal. 243.

10. Where private property is taken as a street, compensation must be made before a citizen can be divested of his rights. *City of San Francisco* v. *Scott*, 4 Cal. 115.

11. A dedication of land to the public as a street may be by deed or other overt act, or may be presumed from the lapse of time or acquiescence of the party; but where there is no abandonment or dedication of the land, the user for a limited time by the public cannot presume a dedication. *Ib.* 116.

12. Where a city is laid out with streets running to the water's edge, such streets should be held to continue on to the high water, if the city front is filled in or the space enlarged by accretion. *Wood* v. *City of San Francisco*, 4 Cal. 193.

13. On an attempt by a municipality to convert a public easement to private use or benefit, and to defeat the right of way over a public street, it is beyond the power of a corporation, and the legislature has no authority to interfere with the disposition of the land and the premises upon which the easement is situated after title has passed from the State. *Ib.*

14. All the public streets of San Francisco running into the water, as laid down on the official map of the city, were by operation of the act of March 26th, 1851, extended and carried to the front line of the city, and as such are subject to the free enjoyment of the public and exempt from executions against the city. *Ib.*

15. The obligation of a municipal corporation to keep the streets in repair is necessarily suspended while they are actually undergoing such alterations as for the time made them dangerous. *James* v. *City of San Francisco*, 6 Cal. 530.

16. Where the law compels the corporation to give out a contract for grading a street to the lowest bidder, it takes away from the corporation the responsibility arising from the acts of the person taking the contract. *Ib.*

17. It follows that where a party was injured by falling at night into an excavation made in grading the street of a city under such contract, owing to the failure to put lights or guards about the place, the contractor and not the city is liable. *Ib.*

18. Under the charter of the city of San José, an ordinance abolishing the salary of the office of street commissioner, and substituting fees instead thereof, is legal and binding on the officers. *Wilson* v. *City of San José*, 7 Cal. 276.

19. The charter of the city of San Francisco provides that when the common council think proper to open or improve a street, etc., notice shall be given, and if no protest be made as provided, then the council shall proceed with the improvement: held, that when an ordinance had passed to give the required notice, which was given and no protest made, the full discretionary power of the council had been exercised, and it became binding as a contract between the city and the property holders to make the improvements, the remaining acts on the part of the city being mere ministerial duties of its proper officers. *Lucas* v. *City of San Francisco*, 7 Cal. 473.

20. The liability of the city for street improvements is limited to the expense of improving the crossings. The remainder is to be paid by the property holders fronting upon the streets. The city in contracting as to the latter must be regarded as the mere agent or trustee, and is therefore not primarily liable. *Ib.*

21. Where the charter of the city of Sacramento authorized the common council to levy a special assessment for grading and improving the streets of the city, and provided that when the council thought it expedient to open, alter or improve any street, they should give notice, etc., and if one-third of all the owners in value of the adjacent property protest against the proposed improvement within ten days after the last publication, it shall not be made, and a protest was presented more than ten days after the last publication of such notice: held, that such protest was not presented in time, and was, therefore, ineffectual: further held, that it must appear that one-third of the owners, in value, of the adjacent property united with it. *Burnett* v. *City of Sacramento*, 12 Cal. 82.

22. An ordinance for the improvement of the streets, passed by the council before the expiration of the time for the presentation of the protest, is not thereby invalid. *Ib.*

23. The legislature had the right to provide in the act known as the consolida-

tion act for the government of the city and county of San Francisco, that the owners of lots in said city should keep the streets in front of their lots in repair. *Hart* v. *Gaven*, 12 Cal. 477.

24. Where the owner of a lot neglects for three days after notice from the superintendent of public streets in said city to repair the street in front of his lot, the superintendent has the right to make a contract for that purpose, and an action will lie in the name of a party performing the work against the owner of the lot adjacent for the amount. *Ib.*

25. To constitute a dedication of land for the purposes of a rural highway, no particular formality is necessary. The intention on the part of the owner to dedicate is the vital question. *Harding* v. *Jasper*, 14 Cal. 646.

26. This intention may be manifested with or without writing by an act of the owner, as throwing open his land to public travel, platting it, and selling lots bounded by streets designated on the plat, or acquiescence in the use of land as a highway, and hence time is not an essential ingredient in the act of dedication. *Ib.* 647.

27. Stronger proof of dedication is required in cases of roads in the country than in cases of streets or lands in a town or city. *Ib.* 648.

28. The charter of the city of San Francisco of 1851 gave the city power to open streets and alleys and to alter and improve the same, and this power includes authority to enter into contracts for that purpose, binding upon the city. And this, notwithstanding section two, article five of that charter, providing that the adjacent property shall bear two-thirds of the expense of every improvement. This section simply made the property holders liable to the city for the two-thirds, and the remedy of the city was by assessments on the property, and such assessments, when collected, go into the city treasury to be used as the city sees fit. *Argenti* v. *City of San Francisco*, 16 Cal. 263.

29. The provision in section five, article three of the charter of 1851, as to not creating liabilities beyond $50,000, over and above the annual revenue of the city, etc., is directory, and not a limitation upon the power of the city to contract debts. *Ib.* 264.

30. The legal effect of this provision is entirely different from the clause in the eighth article of our constitution, prohibiting the legislature from creating debts against the State. *Ib.*

31. Plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which contracts were executed by such officer in his official capacity, made valuable and permanent improvements to the city, for the exclusive benefit of it and its inhabitants; such improvements were made under the immediate supervision of an officer of the city, and when completed, were approved of and received by him on behalf of the city; plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay, as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition to pay: held, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their performance, it would be a fraud on plaintiff to permit her now to repudiate them. *Ib.* 274.

32. The mayor and controller of said city having drawn warrants on the treasurer thereof, payable out of the street assessment fund, in favor of plaintiff, for the improvements so made under said contracts: held, that plaintiff cannot recover on the warrants; that being payable out of a particular fund, they are neither bills of exchange nor promissory notes, and that the treasurer must pay from that fund and no other. *Ib.*

33. Nor can plaintiff recover on some of the warrants so drawn, for the further reason, that they do not specify the appropriations under which they were issued, nor the date of the ordinances making the same, as is required by the eighth section of the third article of the city charter; and

they would not constitute any authority to the treasurer to pay them, even if there were funds in the treasury specially appropriated for their payment. *Ib.* 275.

34. The common council of the city of San Francisco passed an ordinance authorizing the street commissioner to advertise for proposals to grade, plank and sewer a portion of Mission street, in said city, "the same to be paid for by the property holders adjacent * * the proposals to be opened and awarded by the street commissioner, with the committees on streets from both boards of aldermen." This ordinance was published for ten days successively in a daily newspaper of the city, and the advertisement required was made in like manner for the same period. Proposals, based upon certain specifications, were received under the ordinance, and opened by the committee of the two boards and the commissioner, and the work awarded to B. Subsequently, an instrument was executed by B., as contractor, and by the street commissioner, purporting to act in the name of the city, setting forth the acceptance by the city of B.'s proposal, and an agreement by her to pay him for the work at certain designated rates, and an agreement on his part to do the work to the satisfaction of the city and the street commissioner. B. began the work, and afterwards transferred his contract and his interest therein to plaintiff, who completed the work in the best manner, and to the satisfaction of the street commissioner and the city. The work was measured as it progressed by the city's engineer, who duly certified to the accounts for the same, which accounts were duly audited, and upon them warrants were drawn by the controller, by authority of the city, and delivered to plaintiff. The warrants were presented to the treasurer, and payment demanded and refused, on the ground that there were no funds in the treasury applicable to them. Previous to the demand, assessments had been duly levied by the city upon the property adjacent to the improvements, to meet their expenses, and these assessments had been collected by the collector of street assessments, and by him paid into the city treasury. Plaintiff sues the city, as liable either on the express contract, or upon the warrants, or upon implied contracts, for the services rendered and materials furnished, or for money received by defendant to his use: held, that, as under the charter, the city had authority to order the improvements in question, the acceptance of the proposals of B. by the street commissioner and the committee of the two boards converted what were previously mere propositions on the part of the city into contracts, perfect in all their parts, binding alike upon the city and the contractor. *Ib.* 277.

35. Held, further, that the city is primarily liable; that she, and not the contractor, must look to the property holders adjacent to the improvements, for the necessary expenses; that the property holders are not parties to the contracts; that the city must levy and collect the assessments; that the contractor has no claim upon the property or the property holders, but must look alone to the city; that the clause in the ordinance as to how the improvements shall be paid for is only a designation of the sources upon which the city relies for payment. *Ib.* 282.

36. In this case, the city having discharged the assesments by receiving in payment thereof outstanding warrants, she is primarily liable to plaintiff as for moneys received to his use, even on the theory that she acted simply as the agent of the plaintiff in collecting the assessments. *Ib.* 283.

37. The city would not be liable independent of the contract made by her acceptance of the proposals of the contractor. A municipal corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements of a local nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability as upon implied contracts has no application to cases of this character. *Ib.*

38. The doctrine applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes upon the city the obligation to do justice with respect to the same. *Ib.*

39. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain

other property which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner, from the like general obligation. *Ib.*

40. In these cases, the city does not make any promise, but the law implies one, and it is no answer to a claim resting upon such implied contract, to say no ordinance has been passed, or that the liability of the city is void when it exceeds the limitation of $50,000 prescribed by the charter. *Ib.*

41. To fix the liability of the city in respect to money or other property, the money must have gone into her treasury or been appropriated by her, and the property must have been used by her, or be under her control. *Ib.*

42. In case of services rendered, the acceptance of the services must be evidenced by ordinance to that effect. Their acceptance by the city, and the consequent obligation to pay them, cannot be asserted in any other way. If not originally authorized, no liability can attach upon any ground of an implied contract. *Ib.*

43. The improvements in this case—being to particular streets—were local in their character, and though to some extent of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood. The advantages resulting from them do not constitute that kind of general advantage to the city, from the existence of which any liability to pay for the same can be inferred. The general doctrine that when one takes a benefit which is the result of another's labor he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediate to the adjacent property holders, and only indirectly to the city at large. *Ib.*

44. As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money, or other property, which does not belong to her, and to liabilities springing from neglect of duties imposed by her charter, from which parties are enjoined. *Ib.* 284.

45. Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter—as for instance, upon the issuance of bills of credit. *Ib.*

46. The warrants in this case, drawn by the controller and countersigned by the mayor of San Francisco, upon the treasurer, to pay for certain street improvements, will not support an action. They cannot be treated as bills of exchange or promissory notes, for they are drawn upon a particular fund, and their payment is made to depend upon the sufficiency of that fund, while bills and notes must be payable absolutely. *Martin* v. *City of San Francisco*, 16 Cal. 286.

47. These warrants are ineffectual for any purpose, except, perhaps, as evidence in an action founded upon the consideration for which they were given. *Ib.*

48. These warrants, with few exceptions, do not comply in their form with the requirements of the city charter, and would not constitute any authority to the treasurer to pay them, even if funds were in the treasury especially appropriated for their payment, because they do not specify the appropriations under which they were issued, and the date of the ordinances making the same. *Ib.* 287.

See DEDICATION.

II. COMMISSIONER OF STREETS.

49. A street commissioner is empowered to use the necessary force, but no more than is necessary to prevent an injury to the streets of a city, and no action can be maintained against him or those who act under his orders for using such force. *Clark* v. *McCarthy*, 1 Cal. 453.

50. To entitle a party to recover his salary as a street commissioner it is incumbent on him to show, not only that he performed the duties of the office for the time alleged, but first that he had been lawfully elected, and second, that he had qualified himself to hold the office by taking oath and filing his bond in the manner and at the time prescribed by law. *Payne* v. *City of San Francisco*, 3 Cal. 125.

51. A resolution of a municipal body recognizing a party as street commissioner who has not lawfully qualified, will not enable him to recover for services rendered in that capacity on quantum meruit. *Ib.* 128.

SUBSCRIBING WITNESS.

See WITNESS.

SUMMONS.

1. In actions in personam in courts other than admiralty courts, no man can be deprived of his property without having first been personally cited to appear and make his defense, unless by virtue of some positive statutory enactment. *Loring* v. *Illsley*, 1 Cal. 29.

2. The summons cited the defendant to appear and answer the complaint, at 10 A. M., and the judgment was rendered at 9 A. M. against him: held, that the judgment was irregular and a new trial should be ordered, although the court subsequently offered to allow the defendant to come in and defend. *Parker* v. *Shephard*, 1 Cal. 132.

3. Where a defendant is served with summons in a county other than that in which the action is brought, he has thirty* days within which to answer, and a judgment by default rendered before the time for answering expires, will be set aside. *Burt* v. *Scrantom*, 1 Cal. 416.

4. The court can allow a summons to be amended by inserting the notice of the cause of action required therein. *Polock* v. *Hunt*, 2 Cal. 194.

5. If the summons be radically defective it will not support a judgment by default. *People* v. *Woodlief*, 2 Cal. 242.

6. Where defendant's attorneys accepted service of the summons, but attached no date thereto, the date of the return by the sheriff was held sufficient. *Crane* v. *Brannan*, 3 Cal. 194.

7. Where the summons was headed with the words "district court," but was issued out of the county court, under the county court seal, and tested by the judge of said court, it was held good as the writ of the county court. *Ib.* 195.

8. Where a summons is directed to the sheriff of a county and he returns it served, but does not state where he served it, the presumption is he served it in his jurisdiction. *Ib.*

9. Where the summons was issued against Adams & Co. and served on C. B. Macy, and nothing appeared to connect Macy with Adams & Co., it was held that the judgment by default was bad. *Adams* v. *Town*, 3 Cal. 247.

10. A final judgment by default can properly be rendered upon an unliquidated demand, where the defendant has been notified in the summons of the amount for which the plaintiff will take judgment. *Hartman* v. *Williams*, 4 Cal. 255.

11. An appearance by attorney at common law and by our code, amounts to a waiver of service of summons. *Suydam* v. *Pitcher*, 4 Cal. 281.

12. After the adjournment of the term the court loses all control over cases decided, unless its jurisdiction is saved by some motion or proceeding at the time, except in the simple case provided by statute, where the summons has not been served in which the party is allowed six months to move to set aside the judgment. *Carpentier* v. *Hart*, 5 Cal. 406; *Shaw* v. *McGregor*, 8 Cal. 521.

13. Courts cannot know an under officer, and the act and return on a summons of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal. *Joyce* v. *Joyce*, 5 Cal. 449.

14. A judgment by default will be reversed on appeal, where the record shows that the defendant has not been legally served with process. *Ib.*

15. The code allows a party ten days after the service of summons to file his answer, if served in the county, twenty days if out of the county, but within the judicial district, and forty days in all other cases. A nonresident of the State would come under the last clause, and would be entitled to forty days, after the service of of the summons, by three months publication. *Grewell* v. *Henderson*, 5 Cal. 466.

16. The code provides that in relation to service on nonresidents by publication, that "the service of the summons shall be deemed complete at the expiration of the time prescribed by the order of publication:" held, that the publication only effects the service of the summons, and the defendant is entitled to forty days after the

*The code of April 28th, 1851, now allows forty days if out of the county, and not in the same judicial district.

period of publication to file his answer. *Ib.*

17. Production of the original note and mortgage, and proof of the service of summons, are sufficient to justify a decree of foreclosure on default. *Harlan* v. *Smith*, 6 Cal. 174.

18. At common law, when the summons has been served, default confessed every issuable fact stated in the declaration, and could only be set aside for objections to the declaration which would have been good on general demurrer. *Harlan* v. *Smith*, 6 Cal. 174; *Rowe* v. *Table Mountain Water Co.*, 10 Cal. 444; *Hentsch* v. *Porter*, 10 Cal. 558; *McGregor* v. *Shaw*, 11 Cal. 48; *Hunt* v. *City of San Francisco*, 11 Cal. 259; *Curtis* v. *Herrick*, 14 Cal. 119; *Smith* v. *Billett*, 15 Cal. 26.

19. In a suit against a corporation, the summons must be served on one of the officers or agents named in the code, and service on a party in possession of the property who does not appear to be one of the officers named, will not entitle the plaintiff to a judgment by default. *Aiken* v. *Quartz Rock Mariposa Gold M. Co.*, 6 Cal. 186.

20. A defendant who has not been served with a summons is not a competent witness for his codefendant, in an action of trespass. *Gates* v. *Nash*, 6 Cal. 194.

21. Where the attorney of record makes an affidavit that defendant conceals himself to avoid service of process, it is sufficient for an order for the service of summons to be made by publication. *Anderson* v. *Parker*, 6 Cal. 201.

22. An injunction will not lie to enjoin a judgment by default, on the ground that the sheriff's return on the summons does not show the place in which service was made on the defendant, where it is proved on the hearing of the application for injunction that defendant was served in a certain county of this State more than thirty days before entry of his default. *Pico* v. *Suñol*, 6 Cal. 295.

23. An order of court setting aside a default and judgment entered during vacation, is regular and correct where there has been no service of summons upon the defendants. *Pico* v. *Carillo*, 7 Cal. 32.

24. Where a defendant was served with process, but was not given the time allowed by statute to appear and answer, it would be a sufficient reason for the court to quash the writ, on motion, by an amicus curiæ, or for extension of the time on defendant's motion, or a good objection on writ of error, arrest of judgment or motion for new trial; but it cannot be said that the court had no jurisdiction of the person, so as to render its judgment a nullity. *Whitwell* v. *Barbier*, 7 Cal. 62.

25. A judgment by default, where summons had been served on defendant, cannot be attacked, collaterally, for a mere irregularity of service, or for a defective return. *Dorente* v. *Sullivan*, 7 Cal. 280.

26. The only object of a summons is to bring a party into court, and if that object be obtained by the appearance and pleading of a party, there can be no injury to him. *Smith* v. *Curtis*, 7 Cal. 587.

27. A justice of the peace cannot make a summons returnable in eleven days after service. *Deidesheimer* v. *Brown*, 8 Cal. 340.

28. Where a defendant appears for the purpose of taking advantage of irregular summons by a motion to dismiss it, it does not amount to a waiver of his rights so as to cure the defect. Nor does he waive his rights by answering after moving to dismiss and motion to overrule. *Ib.*

29. A judgment obtained by publication of summons against a defendant then out of the State in which the judgment is rendered, though it may be enforced against his property in that State, has no binding force in personam, and is mere nullity when attempted to be enforced in another State. *Kane* v. *Cook*, 8 Cal. 455.

30. Where judgment by default is entered in an action against a party, for fraudulently converting money of the plaintiff, the summons must have apprised the defendant that on failure to answer judgment would be taken against him for the fraud; a mere notice in the summons that a money judgment would be taken will not support a judgment for fraud. *Porter* v. *Hermann*, 8 Cal. 625.

31. Under the theory of the code, the defendant, when summoned by publication in the manner prescribed, is as duly brought into court as if personally served with the summons; and as a legitimate result of being legally in court, unless he denies the allegations of the complaint within six months, he is held to admit

them to be true, and cannot afterwards show their falsity. *Ware* v. *Robinson*, 9 Cal. 111.

32. Where the proof of service of summons consists in the written admissions of defendants, such admissions to be available in the action should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence the court cannot notice them. *Alderson* v. *Bell*, 9 Cal. 321.

33. The statute does not require an admission of service to designate the place where the service was made. The object of such designation when required is to determine the period within which the answer must be filed or when default may be taken. *Ib.*

34. An attachment issued before the issuance of the summons in the suit is void, and the subsequent issuance of the summons cannot cure it. *Low* v. *Henry*, 9 Cal. 552.

35. Where there is but one clerk in the office of a public newspaper, his affidavit of the publication of summons or notice in said paper is sufficient, and it is unnecessary for the affidavit to describe him as principal clerk. *Gray* v. *Palmer*, 9 Cal. 637.

36. The requirement of the statute being positive, that in actions against a minor under the age of fourteen years, personal service of summons must be made, in cases where he resides out of this State, and his residence is known to plaintiff, such residence should be stated in the affidavit of publication. *Ib.* 638.

37. The failure to deposit in the post office a copy of the complaint and summons directed to such minor is not cured by the appearance of the mother, in her own behalf, and the court had no right to appoint a guardian ad litem until the infant is properly brought into court. *Ib.*

38. The failure of a justice of the peace to state on his docket that the summons was returned "served," will not vitiate the judgment on appeal. The fact of service may be shown by the return of the officer on the summons. *Denmark* v. *Liening*, 10 Cal. 94.

39. Where in an action against an incorporated company, the return of the sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company:" held, that it was not sufficient evidence of service to give the court jurisdiction, it not appearing that Street was president, or head of the corporation, or secretary, cashier or managing agent thereof. *O'Brien* v. *Shaw's Flat and Tuolumne Canal Co.*, 10 Cal. 343.

40. A sheriff's return on the summons against a corporation, that he served the same on the president and secretary of the company, is prima facie evidence that the persons named in the return were such officers. *Rowe* v. *Table Mountain Water Co.*, 10 Cal. 444.

41. A personal judgment cannot be given against a party not served with process, in an action on a joint obligation of several defendants. *Treat* v. *McCall*, 10 Cal. 512.

42. To support a plea in abatement founded on the pendency of a prior action, it is necessary to show that process was issued in such action. *Weaver* v. *Conger*, 10 Cal. 238; *Primm* v. *Gray*, 10 Cal. 522.

43. The return of a sheriff on a summons, that he had served it on one Pendleton, one of the partners and associates of the company, is prima facie evidence that Pendleton was such partner and associate. *Wilson* v. *Spring Hill Quartz Mining Co.*, 10 Cal. 445.

44. An acknowledgment of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment is not sufficient. *Montgomery* v. *Tutt*, 11 Cal. 314.

45. An affidavit which avers that affiant on the day named "served the summons in this action upon the defendant, Mary B. McMillan, at her residence in the city of San Francisco, by delivering and leaving with her a copy thereof, attached to a copy of the amended complaint filed in this action is insufficient, in not stating that the person serving it was a white male citizen, etc., or that a certified copy of the complaint accompanied the summons. *McMillan* v. *Reynolds*, 11 Cal. 378.

46. The affidavit of service of summons must show affirmatively compliance with all the requirements of the law. *Ib.*

47. Where judgment of foreclosure was obtained on such service, and the premises sold under the judgment to a party who was at the time of such purchase cogniz-

ant of the fact of such defective service, and also that the defendant was a married woman, and where the defendant has a valid defense to such action, the judgment will be set aside. *Ib.*

48. A judgment rendered against a party who is absent from the State, upon publication of the summons thirty days only, is void for the want of jurisdiction of the person of the defendant. *Jordan* v. *Giblin*, 12 Cal. 102.

49. An affidavit which avers a cause of action against the defendant—that defendant cannot after due diligence be found in this State—that summons has been issued but the sheriff cannot find him; that defendant's residence is in the county where the summons issued, and that defendant still has a family residing in said county—is insufficient to authorize the court to appoint an attorney to represent such absent defendant. *Ib.*

50. Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction. *Ib.*

51. An affidavit for an order of the publication of the summons upon the ground of the absence of the defendant, which states that the defendant could not after due diligence be found in the county where the action was pending; that affiant had inquired of Fogg, who was an intimate friend of defendant, as to his whereabouts; that Fogg was unable to inform him, and that plaintiff did not know where defendant could be found within the State, is insufficient to authorize the publication. A publication made upon such an affidavit will not give the court jurisdiction of the person of the defendant. *Swain* v. *Chase*, 12 Cal. 285.

52. Equity has jurisdiction to vacate a judgment fraudulently altered so as to include a defendant not served with process, and not originally included in the judgment. *Chester* v. *Miller*, 13 Cal. 560.

53. Where a man is sued by a fictitious name, and the return of the sheriff on the summons shows service on defendant by his proper name, as "John Doe alias Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, without proof that Doe and Westfall are the same. *Curtis* v. *Herrick*, 14 Cal. 120.

54. A defendant having no defense to an action cannot go into equity and enjoin a judgment by default on the ground that the Sheriff's return of service of summons on him is false, and that in fact he had no notice of the proceeding. *Gregory* v. *Ford*, 14 Cal. 141; *Gibbons* v. *Scott*, 15 Cal. 286.

55. Where the judgment of the court recites that summons was served on defendant, the fact that years afterwards there appears some erasure or interlineation on the sheriff's return is not sufficient to nullify the return, in the absence of a direct attack upon it for fraud or forgery, or alteration. *Gregory* v. *Ford*, 14 Cal. 144.

56. The superior court of San Francisco city had power to send a summons for service out of the city of San Francisco. *Chipman* v. *Bowman*, 14 Cal. 158.

57. The recital in the docket of a justice who had rendered judgment, that the summons was "returned duly served," is of no weight to prove proper service of the summons. The return of the officer is as much a part of the record as the docket itself, and if the return fail to show sufficient service, the recital being based on the return alone amounts to nothing more than the opinion of the justice, and cannot be relied on to give validity to the judgment. *Lowe* v. *Alexander*, 15 Cal. 300.

58. The record of the proceedings in a justice's court, in which judgment was rendered, must affirmatively show that the suit was brought in the proper township, or the proceedings are coram non judice, and void, and the failure of defendant after summons was served to appear and object that suit was brought in the wrong township is no waiver of the objection. *Ib.* 301.

59. Where the record shows that suit was brought in township number four, Sierra county, that the summons was served by the constable of that township in township number three, and it nowhere appears either that the defendant was a resident of township number four, or a nonresident of the county, or that the suit was within any of the other exceptions of the statute, the judgment rendered is void, and not admissible as evidence of title upon a sale made thereunder. *Ib.* 302.

60. On appeal, a judgment by default will be reversed, unless the record show service of summons on the defendant, or appearance, though possibly a judgment

so obtained could not be impeached collaterally. *Schloss* v. *White*, 16 Cal. 82.

61. If, as contended in this case, a judgment by default be void, because of the absence of the seal of the district court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, the district court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. *Logan* v. *Hillegass*, 16 Cal. 202.

62. If such judgment be not void, but merely irregular, because of the defects named, and the defects can be reached by motion before judgment, or on appeal, then the complaint here to enjoin the enforcement of the judgment should aver that plaintiff has paid the claim for the recovery of which the action was brought, or that he has a valid defense to the same. *Ib.*

63. Under the Act of 1857, (Ch. 236) regulating fees of office in certain counties, the sheriff may charge fees for copies of the summons and injunction served by him in a suit, though the copies were prepared and printed by the plaintiff, and certified by the clerk at the plaintiff's request; but the sheriff must look for his fees to plaintiff, at whose request the copies were served, and cannot sue the clerk for money had and received—although plaintiff had paid the clerk for such copies—unless the money was delivered to him to be paid the sheriff. *Edmonson* v. *Mason*, 16 Cal. 387.

64. The clerk is entitled to charge, under the act, fees for certified copies of summons and injunction, if the copies, though prepared by plaintiff, were certified by the clerk at plaintiff's request. There is no necessity for plaintiff to obtain copies of summons and injunction from the clerk. *Ib.* 388.

65. A judgment by default rendered in a justice's court cannot be attacked collaterally as void for want of jurisdiction of the person of the defendant—who was a resident of the county, but not of the township in which the suit was instituted—when there appears in the record a certificate, endorsed on the summons by the officer serving it, and filed with the justice who acted on it, that the summons was served on the defendant in the township in which suit was commenced. *Fagg* v. *Clements*, 16 Cal. 392.

66. Such certificate is sufficient, prima facie, to establish the jurisdiction of the justice. The objection to the jurisdiction, that defendant did not reside in the township where suit was brought, should have been taken at the trial; and as defendant failed to appear, the judgment is conclusive. *Ib.*

SUNDAY.

1. In the absence of any custom to the contrary, Sundays are computed in the calculation of lay days at the port of discharge; but when the contract specifies working lay days, Sundays and holidays are excluded in the computation. *Brooks* v. *Minturn*, 1 Cal. 483.

2. The constitution provides that if any bill presented to the governor, having passed both houses of the legislature, shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall become a law in like manner as if he had signed it, unless the legislature by adjournment prevent such return: held, that both Sundays intervening must be computed. *Price* v. *Whitman*, 8 Cal. 415; overruling *People* v. *Whitman*, 6 Cal. 660.

3. The act of April, 1858, "for the better observance of the Sabbath, is in conflict with the first and fourth sections of article first of the constitution of this State, and is therefore void. *Ex parte Newman*, 9 Cal. 510.

4. The act violates this section of the constitution because it establishes a compulsory religious observance; and not because it makes a discrimination between different systems of religion. *Ib.* 513.

5. A writ placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. *Whitney* v. *Butterfield*, 13 Cal. 341.

6. Where one attachment was placed in

the sheriff's hands on Sunday and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first writ, no special circumstances being shown. *Ib.*

SUPERIOR COURT.

1. The superior Court of the city of San Francisco has no jurisdiction of proceedings by quo warranto, and a judgment of that court by which the right to an office was determined in these proceedings was reversed on appeal. *People* v. *Gillespie*, 1 Cal. 343; *People* v. *King*, 1 Cal. 345.

2. The superior court had constitutionally all the powers which are specified in the act, and such has been the uniform understanding of the profession. *Seale* v. *Mitchell*, 5 Cal. 403; *Curtis* v. *Richards*, 9 Cal. 39; *Hickman* v. *O'Neal*, 10 Cal. 295; overruling *Meyer* v. *Kalkman*, 6 Cal. 590.

3. The superior court was not intended to be an inferior tribunal in respect to the mode of enforcing its process, but in respect to the character of the subjects of its jurisdiction, and a subordinate relation to other tribunals. *Hickman* v. *O'Neal*, 10 Cal. 295; *Chipman* v. *Bowman*, 14 Cal. 158.

4. The late superior court had no jurisdiction of a suit affecting real estate outside the city limits. If the point arose on the complaint, it would be fatal, and probably if the fact that the property was beyond the city appeared anywhere in the record, it would be fatal. *Watts* v. *White*, 13 Cal. 324.

5. The superior court had jurisdiction of a suit to settle the accounts of a partnership formed for the purpose of mining claims, where the parties resided in the city, but could not by its decree affect the title thereto, or any interest in the claims themselves. *Ib.* 425.

6. The late superior court of San Francisco had power to send a summons for service out of the city of San Francisco. *Chipman* v. *Bowman*, 14 Cal, 158.

SUPERVISORS.

1. A certiorari to the board of supervisors, on the ground of want of jurisdiction, is premature, if taken before the action of the board. *Wilson* v. *Supervisors of Sacramento County*, 3 Cal. 388.

2. A mandamus to a board of supervisors to issue a warrant for a specified sum is irregular; it should direct them to audit the account and issue warrants accordingly. *Tuolumne County* v. *Stanislaus County*, 6 Cal. 442.

3. A contract made by the court of sessions being void, could not be made valid by subsequent ratification of the board of supervisors. *Phelan* v. *Supervisors of San Francisco County*, 6 Cal. 540.

4. The supervisors of a county are a quasi political corporation, and as such, the district courts of this State, by virtue of their general jurisdiction as superior courts, have a supervisory power and control over their proceedings, to the exercise of which appellate power is not necessary. *People* v. *Hester*, 6 Cal. 680.

5. *This may be done by mandamus, prohibition or injunction, but their proceedings cannot be reviewed by certiorari. People* v. *Hester*, 6 Cal. 681; overruled in *People* v. *Supervisors of El Dorado County*, 8 Cal. 61.

6. A mandamus can only compel a board of supervisors to act, but could not direct their action, and the rejection of an account is an action upon it, which is all a mandamus could require where the compensation claimed in the account is not fixed by law. *Price* v. *Sacramento County*, 6 Cal. 256.

7. There is nothing in the act of 1855 creating boards of supervisors in the counties of this State, which entitles a warrant drawn on the fund for current expenses during that year to a priority in payment over a warrant of the same class drawn the year before. As it does not seem to have been the intention of the act

to cut off all previous indebtedness, an honest creditor will not be postponed or denied the benefit of the act under which he contracted, and which provided that warrants should be paid in the order of registry. *Mc Call* v. *Harris*, 6 Cal. 282.

8. A board of supervisors has no power to set apart a portion of the revenue of the county as a fund for current expenses; the order of payment of warrants is established by law, and cannot be changed by the supervisors. *Lafarge* v. *Magee*, 6 Cal. 650.

9. The power to grant a ferry license is not judicial, and its exercise properly belongs to the supervisors. *Chard* v. *Harrison*, 7 Cal. 116.

10. A ferry owner whose license has expired does not lose his right to a renewal of his license, either by the incompetency or refusal of the supervisors to act in the premises. *Chard* v. *Stone*, 7 Cal. 117.

11. Where the supervisors in the exercise of their discretion, determined, after hearing testimony, that a ferry had not been properly kept, and therefore granted it to another, there is no authority to interfere with their determination; but when they act under mistake of law and award the license to another, supposing that he has succeeded to the rights of the owners of the franchise, the error may be corrected by mandamus or any other proper proceeding. *Thomas* v. *Armstrong*, 7 Cal. 287.

12. The consolidation act gives the officers named in the fourteenth section two days after the meeting of the board of supervisors in which to file new bonds. The meeting taking place on the ninth of July, the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane* v. *Scannell*, 7 Cal. 395; *People* v. *Scannell*, 7 Cal. 438.

13. The statute providing that no person shall sue a county for any demand unles the claim had first been presented to the board of supervisors and been by them rejected, applies as well to actions arising out of tort as upon contracts. *Mc Cann* v. *Sierra County*, 7 Cal. 124.

14. Where private property is appropriated to public use by the supervisors of a county, without making provision for paying for the same, such act is illegal and may be enjoined. *Ib.*

15. A writ of certiorari will lie in the district court to review the action of the board of supervisors; otherwise their action would be beyond control. *People* v. *Supervisors of El Dorado County*, 8 Cal. 61; overruling *People* v. *Hester*, 6 Cal. 681.

16. From the necessity of the case, supervisors exercise judicial, legislative and executive powers in matters relating to the police and fiscal regulations of counties. *People* v. *Supervisors of El Dorado County*, 8 Cal. 681.

17. The board of supervisors are not empowered to create a debt or liability on the part of the county for any purpose except as provided by law. *Foster* v. *Coleman*, 10 Cal. 281.

18. The provision of the statute organizing boards of supervisors which empowers them to "require new bonds of any county or township officer, with additional securities, whenever they deem the same necessary," does not leave the exercise of the power to their arbitrary discretion. By the terms "whenever they deem the same necessary," is meant whenever their judgment pronounces, after an examination of the facts of the case, that there is a necessity for further security. *People* v. *Supervisors of Marin County*, 10 Cal. 345.

19. Where the board of supervisors of a county have canvassed the returns of an election, and in the exercise of their discretion declared the result of an election adversely to a party claiming to have been elected, a mandamus will not lie upon the application of such party to compel the board to issue to him a certificate of election. *Magee* v. *Supervisors of Calaveras County*, 10 Cal. 376.

20. It was not intended by the provisions of the ninth section of the act of 1855, "to create a board of supervisors in the counties of this State, and to define their duties and powers," which requires the property belonging to the county to be sold at public auction, that this provision should apply to choses in action. *Beals* v. *Evans*, 10 Cal. 460.

21. A mandamus directing the board of supervisors to proceed and audit certain accounts of the relator, does not necessarily require the board to allow the accounts: such board have a discretion in respect to their action in this regard, though compelled to act on the subject matter of the claim: such writ does not control or pre-

scribe the mode or determine the result of their action. *People* v. *Supervisors of San Francisco County*, 11 Cal. 47.

22. The board of supervisors of a county cannot settle with the county treasurer at a special meeting of said board, unless they have first given public notice of such meeting, and specified in such notice that such business will be transacted. *El Dorado County* v. *Reed*, 11 Cal. 132.

23. The board of supervisors of a county possesses no power to allow the county auditor compensation for the issuance and cancellation of warrants drawn on the county treasurer. *People* v. *El Dorado County*, 11 Cal. 174.

24. An act of the legislature authorizing and directing the board of supervisors of the city and county of San Francisco to audit and allow the claim of a judgment creditor is not unconstitutional, as being judicial in its character. *People* v. *Supervisors of San Francisco County*, 11 Cal. 211.

25. The board of supervisors has no power to direct and authorize the treasurer to pay warrants in violation of the provisions of the statute. *McDonald* v. *Maddux*, 11 Cal. 190.

26. It was the intention of the legislature, by the twenty-fifth section of the act creating a board of supervisors throughout this State, to transfer from the courts of sessions to the boards of supervisors, the general and special powers and duties of a civil character, which had before the passage of that act been vested in such court. *People* v. *Bircham*, 12 Cal. 54.

27. The record of the proceedings of a board of supervisors under their seal is prima facie evidence of such proceedings. *Ib.* 56.

28. The board of supervisors of the city and county of San Francisco have no control over the treasurer in the payment of the interest and principal of the sinking fund of that city. The allowance or disallowance, auditing or refusing to audit of the board, are alike immaterial. *People* v. *Supervisors of San Francisco County*, 12 Cal. 301.

29. The board of supervisors cannot order a special election to fill a vacancy in the office of county judge. *People* v. *Martin*, 12 Cal. 411.

30. The board of supervisors of a county is a special tribunal with mixed powers, administrative, legislative and judicial, and jurisdiction over roads, ferries and bridges is given to it by statute. Its judgments or orders cannot be attacked collaterally any more than the judgments of courts of record. *Waugh* v. *Chauncey*, 13 Cal. 13.

31. The supervisors sitting as a board of equalization have no power to raise the valuation of land as fixed by the assessor, without notice to the owner. The general notice of the sitting of the board by publication does not amount to the notice required. If the board raised the tax without proper notice to the owner, their action is void, and the assessment remains in full force. *Patten* v. *Green*, 13 Cal. 329.

32. Mandamus will not lie to compel the supervisors of a county to order a special election to fill vacancies in the offices of assessor and sheriff. *People* v. *Supervisors of Santa Barbara County*, 14 Cal. 102.

33. An act of the legislature authorizing boards of supervisors to appoint a collector of foreign miners' licenses is not unconstitutional. *People* v. *Squires*, 14 Cal. 17.

34. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento have no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act, and their action, in creating such office and raising such salaries, may be reviewed on certiorari. *Robinson* v. *Supervisors of Sacramento County*, 16 Cal. 211.

35. That act is an enabling statute, creating a board with special powers and jurisdiction, and the board has only the powers conferred by the act. *Ib.*

SUPREME COURT.

I. In general.
II. Jurisdiction.
III. Costs in the Supreme Court.

I. In general.

1. The supreme court is authorized to

render such judgment as substantial justice shall require, but by this is intended substantial legal justice, ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notions of equity entertained by each individual. *Harris* v. *Brown*, 1 Cal. 98.

2. A party should present his whole case on the first hearing, and ought not to be permitted to argue it by peacemeal. On rehearing he will not be allowed to raise new points. *Grogan* v. *Ruckle*, 1 Cal. 197.

3. The supreme court may after a judgment direct a rehearing in a cause before a remittitur is sent down and filed in the court below; but if the remittitur is sent down after the order of rehearing is made, the court still has jurisdiction. *Grogan* v. *Ruckle*, 1 Cal. 194; *Mateer* v. *Brown*, 1 Cal. 231.

4. The unconstitutionality of the statute empowering the governor to commission a person as judge of the supreme court during the temporary absence of one of its judges, fully discussed. *People* v. *Wells*, 2 Cal. 198; 610.

5. At common law, the appellate court either affirms or reverses the judgment, upon the record before it. The opinion which is rendered is advisory to the inferior court, and after the reversal of an erroneous judgment, the parties in the court below have the same rights which they originally had. *Stearns* v. *Aguirre*, 7 Cal. 448.

6. In holding the judiciary act of 1789 to be constitutional, we by no means recognize an unlimited right of appeal from the decisions of the supreme court of the State to that of the United States. *Ferris* v. *Coover*, 11 Cal. 179.

7. A motion to amend the judgment of the supreme court must be made within the ten days allowed for filing a petition for rehearing. *Gray* v. *Gray*, 11 Cal. 341.

8. The legislature cannot require the supreme court to give the reasons for its decisions in writing. The constitutional duty of the court is discharged by the rendition of its decisions. *Houston* v. *Williams*, 13 Cal. 25.

II. Jurisdiction.

9. The constitution of the State confers the authority of peace officers upon the justices of the supreme court and the district judges. *People* v. *Smith*, 1 Cal. 13.

10. The supreme court has no jurisdiction in cases where the matter in dispute is less than two hundred dollars, nor has the constitution which defined this jurisdiction excepted those cases pending before its adoption. *Luther* v. *Ship Apollo*, 1 Cal. 16; *Simmons* v. *Brainard*, 14 Cal. 278.

11. The judiciary act of February 28th, 1850,* provides that an appeal may be taken from any final judgment of a court of first instance, rendered since the first day of January, 1847, and if the decision of the court below be a final judgment, an appeal lies; otherwise not. *Loring* v. *Illsley*, 1 Cal. 27.

12. The legislature has not provided the supreme court with a jury in any case, nor authorized it to cause an issue of facts to be made up in that court and referred to another court for trial. All issues of fact are to be tried in the inferior courts of this State. *Ex parte the Attorney General*, 1 Cal. 87.

13. The constitution has not clothed the supreme court with the powers and jurisdiction of the court of king's bench in England. *Ib.*

14. The supreme court is strictly an appellate tribunal, and has no original jurisdiction except in cases of habeas corpus, and consequently is not empowered to issue a writ of quo warranto for the purpose of inquiring by what authority a person exercises the duties of an office. *Ib.* 88.

15. The supreme court having no original jurisdiction to issue a writ quo warranto, application for the same should be made to the district court, and should the relief be refused which it alone has the power to grant, the supreme court may issue the writ of mandate commanding the necessary process to be issued, or by its writs of injunction or prohibition prevent the abuse of power and correct errors on appeal in the exercise of their powers. *Ib.* 89.

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*The act of February 28th, 1850, repealed by the act of May 19th, 1853.

16. The constitution has not enumerated the courts from whose judgments an appeal will lie to the supreme court, and the statutes have not conferred upon the supreme court appellate jurisdiction over judgments of county courts.* *Warner* v. *Hall*, 1 Cal. 91.

17. The supreme court cannot exercise the jurisdiction conferred by the constitution until the mode in which it shall be exercised is prescribed by statute. *Ib.*

18. The supreme court is strictly a court of appellate jurisdiction, but it may exercise its appellate jurisdiction by means of the process of mandamus; so also it seems by means of the writs of habeas corpus, certiorari, supersedeas, prohibition, &c. *People* v. *Turner*, 1 Cal. 144; *White* v. *Lighthall*, 1 Cal. 348; *Adams* v. *Town*, 3 Cal. 248.

19. To enable a court of strictly appellate jurisdiction to issue the writ of mandamus, it must be shown to be an exercise, or be necessary to the exercise, of appellate jurisdiction. *People* v. *Turner*, 1 Cal. 146.

20. The several district courts of the State have all the same jurisdiction and powers, and stand on the same level, and one cannot attempt by the writ of mandamus to supervise, direct, or restrain the action of another, and this power must exist in the supreme court, for without it the judiciary system would be irremediably imperfect. *Ib.* 149.

21. The supreme court is strictly an appellate court, having no original jurisdiction, and its appellate jurisdiction extends only to those cases in which the legislature authorizes it to entertain appeals. No power was conferred upon the supreme court to review the judgments of the county courts† on appeal. *White* v. *Lighthall*, 1 Cal. 347; *Adams* v. *Town*, 3 Cal. 248.

22. *Though the plaintiff recover less than two hundred dollars, the defendant is entitled to an appeal, if the costs added to the judgment, exceed two hundred dollars.* *Gordon* v. *Ross*, 2 Cal. 157; overruled in *Dumphey* v. *Guindon*, 13 Cal. 30.

23. If inferior courts exceed their powers, the supreme court in every case within its reach would not fail to interfere by a certiorari. *Ex parte Hanson*, 2 Cal. 263.

24. Where the constitution gave the supreme court appellate jurisdiction, but the statute failed to provide the manner of appeal, a writ of error would lie to take the case up. *Adams* v. *Town*, 3 Cal. 248; *Middleton* v. *Gould*, 5 Cal. 190.

25. When a case has been once taken to an appellate court, and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot on a second appeal be altered or changed. *Dewey* v. *Gray*, 2 Cal. 377; *Clary* v. *Hoagland*, 6 Cal. 687; *Gunter* v. *Laffan*, 7 Cal. 592; *California Steam Nav. Co.* v. *Wright*, 8 Cal. 592; *Cahoon* v. *Levy*, 10 Cal. 216; *Davidson* v. *Dallas*, 15 Cal. 82.

26. In equity, the supreme court, on an appeal, has full power and jurisdiction for the purposes of equity to correct the errors of the court below, in whatever shape or by whatever party the appeal is taken up. *Grayson* v. *Guild*, 4 Cal. 125.

27. Under the act of March, 1854, requiring the sessions of the supreme court to be holden at the capital of the State, it became the duty of this court to ascertain for its own action the locality of the seat of government. *People* v. *Bigler*, 5 Cal. 24.

28. No appeal was allowed by law from the county court to the supreme court prior to the first day July, 1854. *Middleton* v. *Gould*, 5 Cal. 191.

29. The constitution of the State confers upon the supreme court appellate jurisdiction in all cases where the amount in controversy exceeds two hundred dollars. *Zander* v. *Coe*, 5 Cal. 231; *Adams* v. *Woods*, 8 Cal. 314; *Conant* v. *Conant*, 10 Cal. 253.

30. The supreme court has no appellate jurisdiction in cases of misdemeanor or crimes of a less degree than felony, and no jurisdiction can be conferred by the statute in these cases. *People* v. *Applegate*, 5 Cal. 296; *People* v. *Shear*, 7 Cal. 140; *People* v. *Vick*, 7 Cal. 166; *People* v. *Cornell*, 16 Cal. 188.

31. The supreme court is an appellate tribunal, and can take no original jurisdiction however conferred. *Ex parte Knowles*, 5 Cal. 301.

32. Where a case has once been decided on appeal, the judgment, however erroneous, becomes the law of the case, and cannot on a second appeal be altered

*The act of May 15th, 1854, confers this appellate jurisdiction on the supreme court.

†The amendment to the code of May 15th, 1854, conferred jurisdiction on the supreme court in appeals from the county courts.

or changed, and this applies not only to questions of law but to questions of jurisdiction. *Clary* v. *Hoagland*, 6 Cal. 688.

33. Where the right to determine the extent and effect of restriction is either expressly, or by necessary implication, confided to the legislature, then the judiciary has no right to interfere with the legislative construction. But in all other cases of restriction it is the right and duty of the supreme court to decide the effect and extent of the restriction in the last resort, and the question whether that right is vested in the legislature or in the judiciary must be equally decided by the supreme court. *Nougues* v. *Douglass*, 7 Cal. 69.

34. It is the right and duty of the supreme court on habeas corpus to review the decisions of inferior courts in cases of contempts. *Ex parte Rowe*, 7 Cal. 182; *Ware* v. *Robinson*, 9 Cal. 111; overruling *Ex parte Cohen*, 6 Cal. 495.

35. The legislature has not the power to impair or take away the appellate jurisdiction of the supreme court, but it has the power to prescribe the mode in which appeals may be taken. *Haight* v. *Gay*, 8 Cal. 300; *Adams* v. *Woods*, 8 Cal. 314.

36. The supreme court has the power under its rules to reinstate causes which had been dismissed at a previous term. *Haight* v. *Gay*, 8 Cal. 300.

37. The constitution of this State confers upon the supreme court appellate power in all cases where the amount in controversy exceeds two hundred dollars, and this appellate power, having been conferred by the constitution, cannot be taken away or impaired by act of the legislature. *Adams* v. *Woods*, 8 Cal. 314.

38. There are but two appellate tribunals under the constitution—the county and supreme courts—and neither of these courts has the right to take original jurisdiction of any case they can hear upon appeal. *People* v. *Fowler*, 9 Cal. 89.

39. The supreme court possesses appellate power in all cases; provided, that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount two hundred dollars, unless a question of the legality of a tax, toll, impost or municipal fine is drawn in question. *Conant* v. *Conant*, 10 Cal. 253.

40. The supreme court possesses appellate jurisdiction from a decree rendered in a suit for divorce from the bonds of matrimony. *Ib.*

41. Unless it affirmatively appear in the record that a copy of the notice of appeal has been served on the adverse party or his attorney, the supreme court cannot take jurisdiction of the case. *Hildreth* v. *Guindon*, 10 Cal. 490.

42. The supreme court will not entertain jurisdiction in cases where the record fails to show that judgment and costs amount to over two hundred dollars. *Doyle* v. *Seawall*, 12 Cal. 280.

43. The supreme court has jurisdiction to hear and determine appeals from the judgment of a county court, on questions of fraud, made on the petition of an insolvent for a discharge from his debts. *Fisk* v. *His Creditors*, 12 Cal. 281.

44. The supreme court has no jurisdiction of an action where the amount involved is less than two hundred dollars, though the costs added thereto would increase it beyond two hundred dollars. *Dumphey* v. *Guindon*, 13 Cal. 30; overruling *Gordon* v. *Ross*, 2 Cal. 256.

45. The words "matter of dispute" in the constitution, conferring jurisdiction on the supreme court, mean the subject of litigation—the matter for which suit is brought. *Dumphey* v. *Guindon*, 13 Cal. 30.

46. The supreme court has the right to compel inferior tribunals to proceed to hear and determine causes of which they refuse to take cognizance, and this by virtue of its appellate powers and its authority to issue process necessary to give them effect. *Purcell* v. *McKune*, 14 Cal. 231.

47. The supreme court has no jurisdiction where the amount in dispute is less than two hundred dollars, though an offset be pleaded. *Simmons* v. *Brainard*, 14 Cal. 278.

48. Plaintiff obtained a preliminary injunction, restraining defendants from obstructing a road leading to plaintiff's mine. Upon the answer being filed, the injunction was dissolved. Plaintiffs being about to appeal from the order dissolving the injunction, the judge thereupon made an order that upon such appeal being perfected by filing a bond, etc., as required by him, the order granting the injunction should be revived, and continue in force. Plaintiffs perfect the appeal, and apply to the supreme court for an injunction, pend-

ing the appeal, on the ground that defendants are disregarding said reviving order, and obstructing to the ruin of plaintiffs: held, that the application must be denied, if this court had the power to grant it; that the remedy of plaintiffs under the reviving order is ample to protect them until the appeal can be heard, or the injunction be dissolved by some competent authority. *Eldridge* v. *Wright*, 15 Cal. 89.

49. The supreme court has no power to grant an injunction pending an appeal. *Hicks* v. *Michael*, 15 Cal. 114.

50. The supreme court has no jurisdiction on appeal of a motion to offset in part a judgment for less than two hundred dollars, against another judgment of six hundred dollars. *Crandall* v. *Blen*, 15 Cal. 408.

51. Where, in an action of forcible entry and detainer, the judgment is for the possession of the premises, and ninety-four dollars, treble damages, besides costs—the title not being involved—query, whether the supreme court has jurisdiction of an appeal from the county court. *Paul* v. *Silver*, 16 Cal. 76.

52. On an indictment for an assault with intent to commit murder, defendant plead guilty to an assault with a deadly weapon with intent to commit bodily injury, and upon this plea, was adjudged to pay a fine of $1,200, or be imprisoned in the county jail. Defendant appeals: held, that the supreme court has no jurisdiction of the appeal, the offense for which defendant was punished being a misdemeanor only, and not a felony. *People* v. *Cornell*, 16 Cal. 188.

See APPEAL.

III. COSTS IN THE SUPREME COURT.

53. Where a judgment was affirmed in part and reversed in part, the respondent was allowed his costs in the court below, but was required to pay the costs of the appeal. *Cole* v. *Swanston*, 1 Cal. 54.

54. The clerk of the supreme court, in entering up the judgments adds the words "with costs," and annexes to the remittitur a copy of the bill of costs filed; these words are a sufficient awarding of costs for the clerk below to issue an execution. *City of Marysville* v. *Buchanan*, 3 Cal. 213.

55. The judgment of the supreme court on appeal and costs consequent thereon is final, and the district court has no authority to prevent immediate execution of the judgment of this court, so remitted. *Ib.*

56. In an action for a dissolution of a copartnership, on appeal the appellate court modified the decree, and under the circumstances of the case the costs of the appeal were equally divided between the plaintiff and the defendant. *Crosby* v. *McDermitt*, 7 Cal. 148.

57. Where a judgment of the court was incorrect in part, the appellate court ordered the court below to modify its judgment accordingly, and the appellants recovered the costs of their appeal. *Welsh* v. *Sullivan*, 8 Cal. 512.

58. If any one or more of the parties desire a modification of the judgment as to costs, the proper application should have been made within the ten days allowed for filing a petition for a rehearing. *Gray* v. *Gray*, 11 Cal. 341.

59. Where a case is remanded for further proceedings and costs awarded in this court, in general terms, the costs on appeal only are included, leaving the costs of the former trial to abide the event of the suit. *Ib.*

60. The costs upon the appeal are properly the costs of the supreme court, and the costs of making up the appeal in the court below, including the costs of making out the transcript. *Ib.*

61. If no motion be made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the supreme court at appellant's cost. *Tryon* v. *Sutton*, 13 Cal. 491.

62. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The clerk below can issue execution for these damages and costs. *McMillan* v. *Vischer*, 14 Cal. 241.

63. Where costs, on appeal to the supreme court, are not entered on the judgment docket in the court below, they do not become a lien until the levy of an execution. *Chapin* v. *Broder*, 16 Cal. 420.

64. Where in ejectment the facts found by the court authorized a judgment for possession but not for damages, the judgment, being for possession and damages, was affirmed in the supreme court, upon respondent's remitting the damages and paying the costs of appeal. *Doll* v. *Feller*, 16 Cal. 434.

SURETY.

I. On an Obligation.
II. On an Undertaking.

I. On an Obligation.

1. A grantor of a promissory note is entitled to demand and notice of protest. *Riggs* v. *Waldo*, 2 Cal. 487; *Pierce* v. *Kennedy*, 5 Cal. 139; *Brady* v. *Reynolds*, 13 Cal. 32; *Geiger* v. *Clark*, 13 Cal. 580.

2. Where a party signs a joint and several promissory note, he is not entitled to notice of demand and nonpayment, though in fact he signed as surety, and such fact was known to the payee. *Humphreys* v. *Crane*, 5 Cal. 175; *Hartman* v. *Burlingame*, 9 Cal. 561.

3. A mere neglect to sue the principal will not exonerate the surety. *Ib.*

4. Where A authorizes B to sign his name as surety to a note, and B signs A's name with his own as joint and several makers of the note, A is not liable. *Bryan* v. *Berry*, 6 Cal. 396.

5. Neglect to sue a contractor for his first breach of contract does not operate so as to release his sureties for subsequent breaches. *City of Sacramento* v. *Kirk*, 7 Cal. 420.

6. Where the authority given by the defendants was to sign his name to a promissory note, as surety, and not as principal, and the authority was not exercised in the manner delegated, the plaintiff cannot recover. *Bryan* v. *Berry*, 6 Cal. 397; *Sayre* v. *Nichols*, 7 Cal. 538.

7. An outstanding liability, as surety or endorser for another, together with an express promise by such surety or endorser to the principal, that he will make the debt his own and pay it, is a sufficient consideration for an express promise to pay an equal amount in a promissory note. *Gladwin* v. *Gladwin*, 13 Cal. 332.

8. If a party sign a promissory note, and append to his name the word "security," or "surety," he only means to bind himself as such, and not as principal. *Sayre* v. *Nichols*, 7 Cal. 538.

9. The failure of a holder of a note to sue when requested by a surety does not operate to discharge the liability of the latter. If the surety desires to protect himself he must pay the debt and proceed against the principal, or apply to a court of equity to compel the holder to proceed against the principal. *Hartman* v. *Burlingame*, 9 Cal. 561.

10. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Kritzer* v. *Mills*, 9 Cal. 23.

11. One who signs a note to pay absolutely at a certain time, although he writes the word surety to his name, is not guarantying another contract, but he is making his own, and whether the consideration of the contract inure to him or his friend is wholly immaterial, so far as the construction and obligation of it are concerned. *Aud* v. *Magruder*, 10 Cal. 288.

12. The word surety written opposite the name of one of the makers indicates no more than that as between the payors such maker is his surety. It is convenient for the purpose of evidence in case the surety has to pay the money, but it does not in any way control the words of the note as between such payor and the payee. *Ib.* 289.

13. The sureties are entitled to stand on the precise terms of the contract, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves. *Tarpey* v. *Shillenberger*, 10 Cal. 390.

14. Mere extension of time to the maker of a promissory note is not sufficient to discharge a surety or endorser. To operate as such discharge the agreement with the maker must be founded upon a valuable consideration, and be such

as will suspend the right of action against the maker. *Williams* v. *Covillaud*, 10 Cal. 426.

15. Plaintiff was surety on a contract for the payment of money, upon which judgment was obtained against all the parties, and execution was subsequently issued and levied upon property of the principal sufficient to satisfy the same. After the levy, the sheriff, under the directions of the plaintiff in execution, took the principal's note for the amount of the judgment and released the levy. Subsequently a second execution was issued upon the judgment, and an attempt made to levy it on the property of plaintiff: held, that the release of the levy of the first execution and the taking of the principal's note, discharged the surety. *Morley* v. *Dickenson*, 12 Cal. 563.

16. February 26th, 1855, Page, Bacon & Co. were indebted to plaintiff, and the debt was due. That firm being then unable to pay, an agreement was made between them and plaintiff, dated on that day, by which an extension was to be given the firm of two, four, six and eight months from date—the debt to be paid in equal installments. In consideration of this extension, defendant and others signed and delivered to plaintiff an instrument dated February 26th, 1855, guaranteeing the payment by P., B. & Co. of such indebtedness in the installments, and at the different times, in said agreement and certificate set forth, conditioned to be void when said certificates were fully paid. In fact, said agreement did not mention certificates. March 13th, 1856, P., B. & Co. issued to plaintiff certificates for his indebtedness in installments, at two, four, six and eight months from that date: held, that defendant is not liable on his guaranty, which was to pay at the times mentioned in the agreement; that plaintiff, having taken certificates, dated March 13th, 1856, thereby extended the time of payment, and released defendant, who was a mere surety. *Gross* v. *Parrott*, 16 Cal. 145.

See Bond, Endorser, Guarantor, Protest.

II. On an Undertaking.

17. Where a bond was given in pursuance of the code of 1850 providing for the collection of demands against boats and vessels, for the discharge of the vessel in a case where the vessel was not liable to be attached under the act: held, that judgment rendered against the principal and sureties in the bond was erroneous, and that a bond given for the release of a vessel, when the vessel was not liable to seizure under the act, was invalid. *McQueen* v. *Ship Russell*, 1 Cal. 166.

18. The district attorney can bring suit against the sureties on a bail bond at any time after the adjournment of the term at which the recognizance was declared forfeited. *People* v. *Carpenter*, 7 Cal. 403.

19. Sureties in a bail bond cannot avail themselves in defense to an action thereon of an insufficiency of the justification of the undertaking. *Ib.*

20. Where a defendant in a replevin suit failed to claim the return of the property in the answer, and on the trial the jury found a verdict for the defendant on which the court rendered judgment against plaintiffs for costs, which were paid: held, that the payment of the judgment as taken was a complete discharge of plaintiff's sureties on the undertaking. *Chambers* v. *Waters*, 7 Cal. 390.

21. In an action of replevin where the defendant has required the return of the property, and given an undertaking for such purpose, a judgment for plaintiff in order to hold the sureties on the undertaking must be in the alternative as required by the code. *Nickerson* v. *Chatterton*, 7 Cal. 571.

22. In an action against the sureties on a replevin bond, it is necessary to allege and prove that the property was delivered to the party requiring it and for whom the bond was given. *Ib.*

23. The liability of the sureties cannot be more than the value of the property fixed by the judgment in the original suit. *Ib.* 572.

24. Where a judgment is rendered against A and his sureties, and A and a portion of his sureties, in order to secure the payment of said judgment, mortgaged their property, subsequent to which the execution under the judgment is levied upon sufficient property of B, a surety not joining in the mortgage, to satisfy the judgment, and afterward is voluntarily released: held, that no action can be main-

tained on the mortgage, for the levy satisfied the judgment. *People* v. *Chisholm*, 8 Cal. 30.

25. Where the plaintiff in replevin gives the statutory undertaking, and takes possession of the property in suit, and is afterward nonsuited and judgment entered against him for the return of the property and costs: held, that his sureties are liable for damages sustained by defendant by reason of a failure to return the goods, but not for damages for the original taking and detention, the value of the goods not having been found by the jury. *Ginaca* v. *Atwood*, 8 Cal. 448.

26. The sureties on the bail bond of a defendant arrested in a civil action are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody. *Allen* v. *Breslauer*, 8 Cal. 554.

27. The sureties upon the official bond of an officer are only responsible for the official acts and not for private debts. *Hill* v. *Kemble*, 9 Cal. 72.

28. Where the obligors in a sheriff's bond bind themselves jointly and severally in specific sums designated, they may all be joined in the same action, but separate judgments are required. *People* v. *Edwards*, 9 Cal. 293.

29. The defect in the approval of a sheriff's bond cannot be set up as a defense in an action on said bond against the sureties. The object of the law in requiring the approval is to insure greater security to the public, and it does not lie in the obligors to object that their bond was accepted without proper examination into its sufficiency by the officers of the law. *Ib.*

30. In an action against the sureties on an injunction bond, the condition of which is, that the plaintiff in the suit for whom the sureties undertook should pay all damages and costs that should be awarded against the plaintiff by virtue of the issuing of said injunction by any competent court, and the complaint did not aver that any damage had been awarded: held, that such complaint is fatally defective. *Tarpey* v. *Shillenberger*, 10 Cal. 390.

31. A failure of sureties upon an undertaking on appeal to justify, when they are expected to, leaves the appeal as though no undertaking had been filed, and ineffectual for any purpose. *Lower* v. *Knox*, 10 Cal. 480.

32. A motion against a sheriff and his sureties, under the provision of the ninth section of the "act concerning sheriffs," passed April 29th, 1851, is a summary proceeding in derogation of the common law, and is penal in its character, and for these reasons the act must be strictly construed. *Wilson* v. *Broder*, 10 Cal. 488.

33. Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them as such assignees to institute suit on the note and mortgage, and a decree of foreclosure in such case, with direction to pay the money into court, to await the further decree of the court is proper, or at least there is no error in such a decree to the prejudice of the defendant. *Hunter* v. *Leran*, 11 Cal. 12.

34. A surety has a right to stand on the precise terms of his contract. He can be held to no other or different contract. *People* v. *Buster*, 11 Cal. 220.

35. In the case of sureties on the official bond of a county treasurer, they all contract together and with reference to the common responsibility. In case of a breach or loss each surety has his recourse for contribution on his fellows. The discharge of one of the obligors affects the contract as to all, and amounts to a release of all as to all future acts of such official. *Ib.*

36. The sureties on a bond given by the party in the original suit to perform any decree that might be rendered therein, cannot, any more than the party, obtain the aid of chancery to vacate a judgment against the principal, unless he shows that he has exhausted all proper diligence to defend in the suit in which judgment was rendered. *Riddle* v. *Baker*, 13 Cal. 204.

37. In an undertaking on appeal, the names of the sureties need not appear in the body of the paper. *Dore* v. *Covey*, 13 Cal. 507.

38. Residence of the sureties and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions. *Ib.*

39. Where a surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the

principal is conclusive against the surety. *Pico* v. *Webster*, 14 Cal. 204.

40. In the case of official bonds, the sureties undertake in general terms that the principal will perform his official duties; and a judgment against the officer in a suit to which they were not parties is not evidence against them. *Ib.*

41. That the sureties had notice of the suit against the principal amounts to nothing, unless it was notice according to the statute, or unless they appear voluntarily as parties to the record. *Ib.*

42. No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only. The presumption is that such signed upon the understanding that the others, named as obligors, would also sign; otherwise as to an undertaking under our system. *City of Sacramento* v. *Dunlap*, 14 Cal. 423.

43. An appeal will not be dismissed on the ground of insufficiency in the justification of the sureties on the undertaking, where the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. *Dobbins* v. *Dollarhide*, 15 Cal. 374.

44. Where the examination of the sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render the appeal effectual, respondent's remedy is by motion in the court below for leave to proceed on the judgment, notwithstanding the undertaking, and not by motion in the supreme court to dismiss the appeal. *Ib.*

45. The statute requires the places of residence and occupation of the sureties to be stated in an undertaking on appeal, only when a stay of execution upon a judgment directing the payment of money is sought. *Ib.* 375.

46. After notice of exception to the sufficiency of the sureties on an undertaking on appeal to the supreme court, they cannot justify without notice to the adverse party; and in this case the justification being made without notice, the appeal was ordered to be dismissed unless appellants within ten days file a new undertaking, and the sureties thereon justify upon notice to the respondent. *Stark* v. *Barrett*, 15 Cal. 364.

47. Plaintiff sued out an attachment against K., and the sheriff levied it on certain goods. Other creditors issued attachments, which were levied by the sheriff on the same goods. Plaintiff then dismissed his attachment, and sued the sheriff in replevin, claiming that K. obtained a portion of the goods of plaintiff by fraud. Instead of taking the goods out of the sheriff's possession, plaintiff made an arrangement with the sheriff, whereby he agreed to sell the goods, and keep the proceeds to answer any judgment plaintiff might obtain in his replevin suit. Sheriff sold the goods, paid the money into court, saying nothing about this arrangement, and the money was paid, by order of court, on the claims of the other creditors. The sureties of the sheriff had nothing to do with, and gave no sanction to the arrangement. Plaintiff had judgment in replevin: held, that the sureties on the sheriff's official bond are not liable to plaintiff for the goods or the money received from the sale— this agreement between him and plaintiff being no part of the sheriff's official duty; that the sheriff, as such, had no legal authority to sell these goods and to hold the money on bailment for plaintiff; and that, in so far as plaintiff trusted the sheriff with the goods, and authorized him to sell them, he became the agent of plaintiff, and must be looked to as such. *Schloss* v. *White*, 16 Cal. 68.

48. Sureties on the sheriff's official bond in this State stipulate for his official, not his personal dealings, and are entitled to stand on the precise terms of their contract. *Ib.*

49. Where an appeal is taken by a party, and as a condition to give it effect, a bond or undertaking, with or by sureties, is annexed— the undertaking being executed for the benefit of the appellant— the law presumes it was executed at his request, and probably no proof of that fact is requisite in a suit by the surety against the appellant, for money paid on account of the suretyship. At all events, very slight proof of such request would be required. *Bostic* v. *Love*, 16 Cal. 73.

50. In suit in the district court, on a bond given in the court of sessions for the appearance there of a party indicted for misdemeanor— the court of sessions having declared the bond forfeited for nonappearance— the sureties cannot defend on the ground that the judgment of forfeiture was

erroneous. That judgment cannot be thus revised. *People* v. *Wolf*, 16 Cal. 385.

.51. The question, whether a party indicted for misdemeanor has an absolute right to appear by attorney and defend, so as to prevent the forfeiture of his bond, not passed on. *Ib.* 386.

See BOND, UNDERTAKING.

SURPRISE.

1. On a motion for a new trial on the ground of surprise at a trial, by the non-attendance of witnesses, the affidavit should show that reasonable diligence had been used in endeavoring to procure the attendance of the witnesses, and should set forth particularly and distinctly the facts which the party expects to prove by the witnesses. *Rogers* v. *Huie*, 1 Cal. 432.

2. Where a slight degree of prudence would guard against surprise, it is not sufficient ground to allege for a new trial. *Brooks* v. *Lyon*, 3 Cal. 113.

3. Where one party to an action is misled by the act of the other, justice demands that a new trial should be granted. *Pinkham* v. *McFarland*, 5 Cal. 138.

4. Surprise at the testimony of a witness called by the adverse party is no ground for a new trial, it not appearing that the party against whom the testimony was given had been misled by previous statements of the witness as to what he would testify. *Taylor* v. *California Stage Co.*, 6 Cal. 230.

5. The mistake of counsel as to the competency of a witness is no ground for granting a new trial. *Packer* v. *Heaton*, 9 Cal. 571.

6. Surprise at the ruling of the court on the trial, as to the admission of testimony, is not a ground for a new trial. *Fuller* v. *Hutchings*, 10 Cal. 526.

7. A party who is unprepared for trial at the time of the calling of the case, should move for a continuance; and if he fails to do this he waives his want of preparation and cannot afterwards, when judgment has gone against him, move for a new trial on this ground. *Turner* v. *Morrison*, 11 Cal. 21.

8. It is not sufficient for a new trial to aver that the party thus represented was ignorant at the time of the trial of the facts. He must show that he could not with the use of due diligence, unmixed with any negligence on his part, have made himself acquainted with or ascertained the existence of the facts. *Williams* v. *Price*, 11 Cal. 213.

9. A new trial will not be granted on the affidavit of the attorney of record, that he as well as his client and witnesses were absent on the trial of the case because of a verbal agreement by opposing counsel to give notice of a day of trial, when such affidavit is met by counter affidavits by the opposing counsel, and when an attorney did appear and contest the case on the trial. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 13 Cal. 230.

10. Complaint avers in substance that defendant made his note, etc., setting out a copy, that plaintiff is holder by transfer from the payee, etc., and that defendant is indebted to the plaintiff thereon in the sum, etc. The complaint then avers: Plaintiff further shows that after said note was executed, etc., * * * defendant by virtue of * * * proceedings in insolvency, etc., * * * claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows, that after said discharge as aforesaid, on or about * * * defendant promised the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby revived said obligation, etc. Plaintiff herein having rested his case upon proving his note, and defendant not introducing any proof of his discharge in insolvency, the court below instructed the jury to find for plaintiff, and afterwards set aside the verdict and granted a new trial: held, that this court will not revise the discretion of the court below in granting the new trial; that defendant might well have been taken by surprise, and supposed it unnecessary to introduce proof of his discharge. *Smith* v. *Richmond*, 15 Cal. 502.

11. Where in suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer denies such title, plaintiff must prove his title as averred, at least in substance, and he cannot, against defendant's objection,

recover on another and different title. And where, in such case, plaintiffs were permitted to prove and recover on a title other than the one set up, it was error in the court below to refuse a new trial, the motion for which was based on an affidavit of defendant that he was taken by surprise arising out of the frame of the pleadings, and that he could have rebutted plaintiff's case but for this surprise. *Eagan* v. *Delaney*, 16 Cal. 87.

SURVEY.

1. A survey may be detailed from memory by a witness as well as by a diagram, but must by statute be excluded, unless the witness be a county surveyor, or be introduced to rebut or explain his survey. *Vines* v. *Whitton*, 4 Cal. 230.

2. A map made by a county surveyor, with protractions of certain lines made by his deputy, is admissible in evidence when both officers swear to the correctness of the protractions. *Gates* v. *Kieff*, 7 Cal. 126.

3. A mere survey and marking lines of a boundary, without an enclosure of the premises, is not a possession in law, unless made so by complying with the statute in reference to the mode of maintaining possessory actions on public lands. *Bird* v. *Dennison*, 7 Cal. 302.

4. Where a claim to a tract of land under a Mexican grant, somewhere within a certain larger tract, was ascertained and the land segregated by a survey under a decree of confirmation by the United States supreme court: held, that the land became immediately taxable and that an assessment thereof will be presumed to have been made after the survey, where the time allowed by law for the assessment extended to a day four days after the survey. *Palmer* v. *Boling*, 8 Cal. 389.

5. A line upon which a ditch is actually intended to be dug should be run within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditchowners date back to the survey; what is a reasonable time must depend upon the circumstances of the case. *Parke* v. *Kilham*, 8 Cal. 79.

6. A private survey is no legal evidence of the facts it purports to contain, since if it were, any man might recover the land of another by including it in his own boundaries. *Rose* v. *Davis*, 11 Cal. 141.

7. Where a private survey is admitted as a diagram but not as evidence, the court should clearly explain to the jury the precise purpose and effect of its admission. *Ib.* 142.

8. A survey or map of the United States surveyor of a grant is inadmissible as evidence to establish boundaries, without proof of the orders or authority under which he acted. *Ib.*

9. The matter of surveys of floating grants belongs to the executive department of government, under the legislation of Congress on the subject of the public lands; with such surveys the courts of justice have nothing to do. Whether in justice to the claimants the location should have been different from the official survey is none of their concern. That belongs to a department of government whose action is not subject to review by the judiciary. *Waterman* v. *Smith*, 13 Cal. 413; *Moore* v. *Wilkinson*, 13 Cal. 486; *Boggs* v. *Merced Mining Co.*, 14 Cal. 361; *Yount* v. *Howell*, 14 Cal. 469.

10. The location of the specific quantity may be made by a survey of such quantity, or by grants with specific boundaries of such parts of the general tract as will reduce it to such specific quantity. *Waterman* v. *Smith*, 13 Cal. 416.

11. The approval of the survey by the proper officers is the determination, the judgment of the appropriate department of the government that the survey does conform to such decree. *Moore* v. *Wilkinson*, 13 Cal. 487; *Boggs* v. *Merced Mining Co.*, 14 Cal. 361.

12. There is no obligation resting upon the claimant of land under a Mexican grant, or upon the United States surveyor general, to give notice of the official survey directed by the final decree of confirmation to any one, and it is of no consequence how secretly or how openly the survey is made. *Boggs* v. *Merced Mining Co.*, 14 Cal. 358.

13. In ejectment on a patent issued upon a final decree of confirmation of land claimed under a Mexican grant, defend-

ant cannot set up fraud in the survey, or the procurement of the patent, to defeat the action. If the defendant have vested rights so as to avail him against the assertion of any claim of the government respecting the premises in controversy, it would only follow that the patent was inoperative to that extent—not that it is void. The rights of the defendant would in that case be effectually protected by the provisions of the fifteenth section of the act of March 3d, 1851, and the patent would be like a second deed to premises previously granted, and pass, as to the property, no interest. *Boggs* v. *Merced Mining Co.*, 14 Cal. 361; *Yount* v. *Howell*, 14 Cal. 469.

14. Nor would the fraud alleged here and supposed to consist in a variance between the private survey made by the grantee and the official survey made by the surveyor general, and concealment of this latter survey, avail defendant in avoiding or resisting the patent even if presented in an original or cross bill. *Boggs* v. *Merced Mining Co.*, 14 Cal. 363.

15. A certificate of the surveyor general that the paper "is a true and accurate copy of a document" on file in his office, is sufficient against the objection that the copy is not duly authenticated, it being conceded that such document was the original grant. *Natoma W. and M. Co.* v. *Clarkin*, 14 Cal. 550.

16. The deposition of a surveyor who ran the boundary lines of a grant, taken in one action is admissible in anothor action between different parties as hearsay evidence, upon the location of such lines, after his death. *Morton* v. *Folger*, 15 Cal. 278.

17. In ejectment for land within Sutter's Fort, in the city of Sacramento, if the petition of Sutter, soliciting eleven leagues in the establishment "named New Helvetia," and the grant in which is conceded the land referred to in the petition "named New Helvetia," be in evidence, together with the declarations of Vioget in connection with the accompanying map, fixing the southern boundary of the grant some miles below the American river, and also, together with the proof that the territory lying between the American river and Sutterville, the western line of Leidesdorff's grant and the Sacramento river, embracing "Sutter's Fort," and the enclosures and settlements around it, was known and recognized by every one throughout the country as New Helvetia; that Sutter had entire and undisputed possession of the same; that no one questioned his right till 1850; and that the premises in dispute were within his enclosures at the fort; the evidence would be prima facie, if not conclusive proof, that the premises were covered by the grant. *Morton* v. *Folger*, 15 Cal. 278; *Cornwall* v. *Culver*, 16 Cal. 427.

18. California, upon her admission into the Union, acquired, under the eighth section of the act of Congress of September 4th, 1841, entitled "an act to appropriate the proceeds of the sales of the public lands, and to grant preëmption rights," a vested and present interest in 500,000 acres of land, with a right to select and locate the same, in such manner as her legislature might direct, out of any of the public lands of the United States, except such as were or might be reserved from sale by any law of Congress, or the proclamation of the President. *Doll* v. *Meador*, 16 Cal. 315.

19. This right of selection or location was not suspended until the United States had made their surveys, but locations made previous to the survey of the United States were subject to change, if, subsequently, upon the survey being made, they were found to want conformity with the lines of such survey. With this qualification, and the further qualification of a possible reservation by a law of Congress, or a proclamation of the President, previous to the survey, which might have required further change, or the entire removal of the location, there was no limitation upon the right of the State to proceed at once to take possession and dispose of the quantity to which she was entitled by the grant. *Ib.*

20. Conformity in the locations with the sectional divisions and subdivisions of the United States survey is required, to preserve intact the general system of surveys adopted by the federal government, and to prevent the inconvenience which would ensue from any departure therefrom. *Ib.*

21. The laws of this State, authorizing the selection or location of lands under the act of Congress, provide for securing conformity in the locations with the lines of the government survey. *Ib.* 316.

22. The effect of a location pursuant to the laws of California, upon lands subject

to location, is to make particular the general grant of the federal government, and to vest an absolute and perfect title to the same, which the State may, by her patent, convey. *Ib.*

23. Neither the tenth section of the act of 1841, nor the act of May 23d, 1844, entitled "an act for the relief of citizens of towns upon the land of the United States, under certain circumstances;" nor the act of March 3d, 1853, providing "for the survey of the public lands in California, the granting of preëmption rights therein, and for other purposes," in effect reserve town sites from same. *Ib.* 321.

24. New States, under the act of September 4th, 1841, acquire their interest upon their admission into the Union, and may make selections of land before the survey of the United States—which selections are only subject to three qualifications: first, they must not be of lands reserved from sale by any law of Congress or the proclamation of the president; second, they must be in parcels of not less than three hundred and twenty acres each; and third, the parcels selected must be in such form as to correspond with the survey of the United States, when made. *Ib.* 331.

25. State selections will not become absolute and definite until the survey—until then, the parcels selected may be subject to a possible reservation from sale; and when there is no such reservation, they may require some change in their exterior lines, so as to conform to the official sectional divisions and subdivisions. In the legislation of the State, provision is made so as to secure such conformity. *Ib.*

26. For land, shown to be within the boundaries of the general tract granted to Sutter, in the county of Sacramento, ejectment will lie directly upon the grant; and it is no objection to a recovery, that an official survey and measurement have not as yet been made by the officers of the government; and that it may possibly appear, when such survey and measurement are made, that there exists, within the exterior limits of the general tract, a quantity exceeding the eleven leagues. If there be such excess, it is for the government to survey and lay it off. *Cornwall* v. *Culver*, 16 Cal. 429.

27. In ejectment on a patent from the United States for land under a Mexican grant, in which patent there was incorporated a plat of survey, on the margin of which was a memorandum that the land was surveyed under the orders of the United States surveyor general, by Von S., deputy surveyor, and that the field notes from which it was made had been examined and approved by the United States surveyor general for California, and were on file in his office, plaintiff offered the patent of evidence, and defendant objected to the survey it set forth, on the ground that the deputy surveyor who made it was interested in the grant: held, that the objection is untenable; that it is immaterial whether the deputy was, at the time, interested in the grant or not, as the approval of the survey by the surveyor general and by the proper department at Washington imparted validity to the survey, and put it beyond the reach of attack in actions of ejectment; that such approval was the judgment of the appropriate tribunal; that the survey was in conformity with the final decree of confirmation—this case having arisen previous to the act of Congress of 1860, giving the district court supervision over the action of the surveyor general, etc. *Mott* v. *Smith*, 16 Cal. 548.

28. Under the decision in *Fossat's case*, 21 How. 445, it may be true that the jurisdiction of the United States district court previous to this act of Congress embraced all questions as to the location and boundaries of the land confirmed, and could have been exercised to control the surveys of such lands until the issuance of the patent; but where no question was made as to the form or correctness of the survey, by proper parties, before the district court, pending the proceedings for confirmation, the approval of the survey by the surveyor general and the department at Washington was final. *Ib.*

29. Of that approval, and also of the regularity and validity of all the different proceedings required by the acts of Congress, from the filing of the petition of the claimant before the board of land commissioners to the issuance of the patent, the patent itself is, in an action of ejectment, not only evidence, but conclusive evidence against the government and all parties claiming under the government, by title subsequent, and against parties claiming no higher title than mere possession. *Ib.*

SURVEYOR.

See SURVEY.

SWAMP AND OVERFLOWED LANDS.

1. The actof May 3d, 1852, "providing for the disposal of 500,000 acres of land granted by Congress to this State," is not in conflict with the act of Congress of 1841, which provides for their location after they have been surveyed. *Nims* v. *Palmer*, 6 Cal. 13.

2. This State has a right to dispose of the swamp and overflowed lands granted to her by Congress prior to the issuing of a patent from the United States, so as to convey to the patentee a present title as against a trespasser. *Owens* v. *Jackson*, 9 Cal. 324; *Summers* v. *Dickinson*, 9 Cal. 556.

3. The language of the act of Congress conveyed to the State a present interest in the lands. The description of swamp and overflowed lands is sufficient to give the State a present prima facie right. *Owens* v. *Jackson*, 9 Cal. 323.

4. The patent is a matter of evidence and description by metes and bounds, and its office is to make the description of the land definite and conclusive, as between the United States and the State. *Ib.*

5. The Governor, in issuing a patent to an individual of such lands, acts as the agent of the State, under powers conferred by statute, and his authority extends only to such lands as were granted to the State by the act of Congress. *Summers* v. *Dickinson*, 9 Cal. 555.

6. The third section of the act "to provide for the construction of canals, and for draining and reclaiming certain swamp and overflowed lands in Tulare Valley," passed April 11th, 1857, is a grant upon condition precedent, and not upon condition subsequent, and passes no estate to the grantee, until performance of the conditions annexed—that is, until the reclamation of the lands. *Montgomery* v. *Kasson*, 16 Cal. 193.

7. This grant is a contract between the State and the grantees, by which the State grants certain lands, upon condition of work to be performed; the grant to take effect when the work is done. It is a contract by which rights may be acquired absolutely, upon performance of the acts specified as the consideration moving to the State. *Ib.* 194.

8. The grantees under the act, having surveyed the lines of the canals mentioned therein, and commenced the work of excavating one of them, and continued the same within and during the year after the passage of the act, have brought themselves within the first sections thereof, and secured the right to proceed with the reclamation; and, when this is accomplished, to take one-half of the lands. And if, within the five years limited in the act, the reclamation be effected, the title to the alternate sections designated will vest in the grantees absolutely. *Ib.*

9. With the contract, and the rights of the grantees thereunder acquired by this part performance of its consideration, the legislature cannot intefere. They are protected by both the Federal and the State constitutions. *Ib.* 194.

10. The act of April 20th, 1858, repealing the act of April 11th, 1857, making this grant, and declaring the rights and privileges thereunder forfeited, is unconstitutional and void. *Ib.*

11. Where one of the grantees under this act of 1857 enters into an agreement to sell to defendant five of the sections of land embraced within the act, and covenants that he and his associates will execute a good and sufficient deed to the defendant, upon payment of the several notes given as the consideration; will complete the canals within the five years allowed; and that by means thereof, and the operation of the statute, they will have a good and valid title to the premises: held, that defendant cannot resist the payment of the first note merely because the legislature has attempted, by an unconstitutional act, to repeal the contract of the State with the vendor and his associates—the agreement itself providing for a surrender of the unpaid notes, and a return of the moneys paid, in case of future failure of title, and the rights of the grantees of the State being fully known to defendant. *Ib.* 195.

12. As it is desirable that there should be some end to the present controversy, and other controvesies of a similar character, with respect to the land claimed under the grant to Sutter in Sacramento county, it will be well to look with some care into the nature of the reservation of overflowed lands. The petition of Sutter is for eleven leagues, "not including in said eleven leagues the land which is periodically inundated with water in winter." The grant is for eleven leagues "without including the lands inundated by the impulse and currents of the rivers." The language of the grant was probably intended as a compliance with the terms of the petition, and has, as we conceive, but one meaning, and that is, to exclude lands which are inundated during the winter, and does not apply to lands which are occasionally flooded upon a rise of the rivers, either from protracted rains in the winter, or the melting of the snows of the Sierra Nevadas in the spring. The whole country within the exterior limits of the grant, with the exception of small portions entirely insufficient to meet the quantity specifically granted, is sometimes flooded in this way. The most valuable tracts, both for cultivation and pasturage, are the low lands bordering on the streams, over which every two or three years the water rests for a few days at a time. They were the lands which any one in the position of Sutter, at the time he presented his petition to the government, would naturally have selected, and these lands the survey actually made by Vioget, both on the Sacramento and the Feather rivers, included. As we read the petition of Sutter, he solicits the eleven leagues excluding the land which is periodically in the winter inundated, that is, the lands which are regularly inundated during the winter, and refers only to what are known as tule lands. No other lands will meet the terms of the petition. These lands are regularly, periodically, every winter, inundated. The low lands, which are not tule lands, are not thus inundated every winter, but only occasionally—often at intervals of three or four years. The tule lands remain, too, inundated to a greater or less extent during the entire winter and spring—until the waters of the Sacramento and Feather rivers subside to their lowest point. The least rise from the first rains of much length in the winter covers them with water. They are unfit for cultivation without draining. Within the exterior limits of the grant to Sutter there is an immense tract of these tule lands, and it is to them that the reservation applies. *Cornwall* v. *Culver*, 16 Cal. 430.

TAX COLLECTOR.

1. The tax collector in Oakland has no right summarily to sell the property upon which the taxes were unpaid, at public sale, as the taxes could only be recovered by suit. *Hays* v. *Hogan*, 5 Cal. 242.

2. Though the office of sheriff and tax collector are distinct by the constitution, yet they may be united in the same hands. *Merrill* v. *Gorham*, 6 Cal. 42; *People* v. *Squires*, 14 Cal. 16.

3. Where the sheriff as ex-officio tax collector received taxes, and afterwards, on being sued therefor, denied the right of the county to recover the same from him because the same had been illegally levied by the court of sessions; held, that although the court of sessions had no power to levy taxes, yet the defendant being the agent or trustee of the county, was estopped from denying the right of the county to recover. *Placer County* v. *Astin*, 8 Cal. 305.

4. The offices of sheriff and tax collector, though filled by the same person, are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. *People* v. *Edwards*, 9 Cal. 292.

5. The revenue act of 1854 made the sheriff ex-officio tax collector, and provided that he should be liable on his bond for the discharge of his duties in the collection of taxes. No other bond is required by law of the sheriff, except when he acts as collector of foreign miners' licenses; held, that the bond entered into in 1856 must be deemed to have been executed in view of the provisions of the revenue act, and that all delinquencies in the collection of taxes, exceptforeign min-

ers' licenses, are covered by the bond. *Ib.*

6. Where the legislature passed an act to remedy the failure on the part of the tax collector to publish the names of the owners, together with a list of the property, such act cannot be defeated upon the constitutional ground that it is not uniform in its operation. Such act is not general, but special, and is passed not to meet a given state of facts; and consequently, that provision of our constitution which provides that "all laws of a general nature shall be uniform in their operation," does not apply. *Moore* v. *Patch*, 12 Cal. 271.

7. The sheriff being ex-officio tax collector of foreign miners' licenses by an act of the legislature, may be deprived of the office of tax collector before the expiration of his term. *People* v. *Squires*, 14 Cal. 16.

8. The constitution affixes no period of tenure to the office of tax collector, nor does it provide any mode of appointment. So far as this office exists in the incumbent, it is an office created by legislative act. The legislature may direct how it shall be filled, and how its duties shall be discharged. *Ib.*

9. Assessors and tax collectors are constitutional officers, but it is not necessary under the thirteenth section of article eleventh of the constitution that every portion of the revenue pass through their hands. The legislature may authorize the tax payer to pay his taxes directly into the treasury. *Ib.* 17.

10. The foreign miners' license, though in some sense a tax, yet probably it is not so in the sense involved in the necessary duties of a tax collector, as a tax collector on land or personal property. *Ib.* 18.

11. A tax collector has power to contract for publishing the delinquent list of tax payers, so as to bind the county for payment of the price. He is the agent of the county in this respect, and for any reasonable exercise of that agency the county is responsible. *Randall* v. *Yuba County*, 14 Cal. 222.

12. And where he did so contract with plaintiffs, who publish the list and sue the county for the price, the fact that the tax collector had assented to a contract previously made or attempted to be made by the supervisors with another party for publishing the list is not enough to affect plaintiffs if they had no notice of it; and evidence of such assent was properly ruled out. *Ib.*

13. Taxes not justly due and paid under protest, may be recovered back by suit against the tax collector. *Falkner* v. *Hunt*, 16 Cal. 170.

TAX DEED.

See DEED, XVII.

TAXATION.

1. With the exception of exports, imports, tonnage and such things as are held by the United States government, where its rights might be impaired if the property was taxed by the States, it seems to be conceded by most American jurists that the power of taxation exists in the States to a full extent. *People* v. *Naglee*, 1 Cal. 236.

2. The sovereign States may, subject to the above restrictions, tax everything within their territorial limits, and every person, whether citizen or foreigner, who resides under protection of their respective governments. *Ib.*

3. Foreigners emigrating to a country, after they land and become intermingled with citizens, are subject to be taxed by the State. *Ib.*

4. Individuals living upon the public lands of the United States, whether as naked trespassers or claiming under a preëmption right, are not exempt from taxation by the State. *Ib.* 238.

5. The State can levy a poll tax to such extent as it might deem expedient upon all persons engaged in mining upon public lands, and there is nothing in the constitution of the United States which deprives the State of the power of imposing it. *Ib.*

6. Where the State passed a law taxing foreign miners, until such time as Con-

gress shall by law assume the regulation of the mines, is not contradictory or repugnant to the power of Congress. *Ib.* 240.

7. Under the treaties existing between the United States and foreign powers, even that most liberal to aliens does not exempt them from taxation by a State in the enjoyment of certain privileges. *Ib.* 246.

8. Foreigners cannot be said to have any property to enjoy in the mineral lands by which the constitution of the State would guarantee them against taxation for working them and extracting the metals therefrom. *Ib.* 252.

9. The constitutional provision requiring taxation to be uniform, refers only to property, and not that the entire aggregate amount of taxation upon persons, or the value of property in every city or town of the State should be equal to and uniform with the amount in every other city and town. *Ib.*

10. Where a tax is laid upon property, it is not necessary or proper for a court to interfere by a decree rendered in an injunction suit to restrain the collection, to order a sale of the premises: the municipality should be left to make the amount of the tax in the ordinary way. *Weber* v. *City of San Francisco*, 1 Cal. 456.

11. The mere right to collect wharfage and dockage for a certain term of years is neither real estate nor personal property, but a franchise or incorporeal hereditament, an uncertain profit issuing out of a reality, and this property is not taxed by the revenue law of 1851. *Dewitt* v. *Hays*, 2 Cal. 468.

12. Property, whose owners reside in New York, and by whom it was sent to California to be employed in labor, is liable to taxation; nor can the legislature exempt any species of property, however owned, from taxation. *Minturn* v. *Hays*, 2 Cal. 591.

13. Where the same property is taxed abroad it is no ground why it should not be taxed in California, when it is within the limits of the latter State. *Ib.* 592.

14. In all cases involving simply the question of taxation, the issue is strictly one at common law, and courts of equity can take no cognizance thereof, and in such case to grant an injunction is error. *Ib.* 293.

15. The United States as owners of land within the limits of a State, only occupies the position of any private proprietor, with the exception of exemption from taxation. *Hicks* v. *Bell*, 3 Cal. 227.

16. When a foreign miner, subject to a license tax, was employed by one of a partnership to work in the mines which were the partnership property: held, that the employer, and not the partnership, was liable for the tax. *Meyer* v. *Larkin*, 3 Cal. 405.

17. The certificate of the tax collector, offered to prove payment of taxes, so as to show that there was no abandonment of the possession of the premises, is not evidence where the tax collector himself can be called as a witness. *Powell* v. *Hendricks*, 3 Cal. 430.

18. The power of the legislature to tax trades, professions and occupations, is a matter completely within the control, and unless inhibited by the constitution, eminently belonging to and vesting in the sound discretion of the legislature. *People* v. *Coleman*, 4 Cal. 49.

19. The provision that taxation shall be equal and uniform throughout the State does not operate as a limitation to the taxing power of the legislature, and apply to any species of taxation, but is to be taken as applying only to direct taxation on property as such. *Ib.*

20. If the legislature should pass a revenue act designedly operating unequally, or if a want of uniformity in its operation was apparent on its face, it would be the duty of the supreme court to interpose and prevent the commission of so grave an injustice. *Ib.* 56.

21. The revenue act of 1853 provides that the board of supervisors shall levy, in addition to a State tax, a tax not to exceed fifty cents on each hundred dollars, for county purposes, and such other special taxes as may be by law authorized to be collected. The board levied a tax of fifty cents for county purposes and twenty-five cents for funded debt tax: held, that both of these should have been included in the fifty cents for county purposes. *McDonald* v. *Griswold*, 4 Cal. 252.

22. The act of May 4th, 1852, to incorporate the town of Oakland, confers no power of taxation directly, but leaves it to be derived from the general act of March 27th, 1850, under which the trustees of towns have power to levy and col-

lect a tax annually, not exceeding fifty cents on every hundred dollars of the assessed value of the property, and providing further, that unpaid taxes should be recovered by a suit in the name of the corporation: held, that an assessment of two and three-fourths per cent. was wholly unauthorized by law and void. *Hays* v. *Hogan*, 5 Cal. 242.

23. To sustain a title by virtue of a tax deed, every prerequisite to the exercise of the power of sale by the officer must be shown to have been accomplished. *Norris* v. *Russell*, 5 Cal. 257; *Ford* v. *Holton*, 5 Cal. 321.

24. The power to tax is one of the highest attributes of sovereignty, and may or may not be exercised at the will of the sovereign. *Hunsacker* v. *Borden*, 5 Cal. 290.

25. The fact that the assessment of State and county taxes for 1855–6, in San Francisco county, was not based on the valuation of the city assessor, as required by the act creating the board of supervisors, passed 1851, is not a sufficient ground for an injunction upon the collection of the taxes, as the party could have appealed to the board of equalization if aggrieved. *Merrill* v. *Gorham*, 6 Cal. 42.

26. If a tax is illegally imposed, the parties taxed have a perfect remedy at law, and a court of equity has no power to interpose. *Robinson* v. *Gaar*, 6 Cal. 275.

27. A. & Co. having on general deposit with B. & Co., of Marysville, seventy-five thousand dollars, a tax for county purposes levied thereon and payment demanded, both from B. & Co. and A. & Co.: held, that the tax was legal. *Yuba County* v. *Adams*, 7 Cal. 37.

28. The levy of a tax created a judgment and lien on the property, having the force and effect of an execution, and could be enforced in the same manner. *Ib.*

29. The power of taxation was given to the legislature, without limit, for all purposes allowed by the constitution, and the framers of that instrument knew that it was not the practice of governments well conducted to borrow money for the ordinary expenses of government. *Nougues* v. *Douglass*, 7 Cal. 68.

30. If the legislature had no right to create a State debt beyond the limited fund by the constitution, that body has no constitutional right to tax the people to pay a void debt. *Ib.*

31. The power of taxation for purposes contemplated by the constitution is unlimited in the legislature, but such power does not exist for purposes not sanctioned by that instrument, but expressly prohibited. *Ib.*

32. The act of 1855, imposing a tax of fifty dollars on every person arriving in that State by sea who is incompetent to become a citizen, is void. *People* v. *Downer*, 7 Cal. 171.

33. The revenue law of 1854 authorized the payment of a portion of the taxes in controller's warrants. The acts of 1855 and 1856 provide for the funding of the State debt and the collection of the revenue in cash, and forbid the treasurer to liquidate any of the debt except as therein provided: held, that the act of 1854 allowing payment in warrants was thereby repealed. *Scofield* v. *White*, 7 Cal. 400.

34. The acceptance by a collector of taxes of a warrant is not a liquidation of the debt, but the receipt of it by the State treasurer from the collector would be a liquidation for which the treasurer would be responsible. *Ib.* 401.

35. Where the sheriff, as ex officio tax collector, received taxes, and afterwards, on being sued thereon, denied the right of the county to recover the same from him, because the same had been illegally levied by the court of sessions: held, that although the court of sessions has no power to levy taxes, yet the defendant being the agent or trustee of a county was estopped from denying the right of the county to recover. *Placer County* v. *Astin*, 8 Cal. 305.

36. Where a claim to a tract of land, under a Mexican grant somewhere within a certain larger tract, was ascertained and the land segregated by a survey, under a decree of confirmation by the United States supreme court: held, that the land became immediately taxable, and that an assessment thereof will be presumed to have been made after the survey, where the time allowed by law for the assessment extended to a few days after the survey. *Palmer* v. *Boling*, 8 Cal. 388.

37. The assessment of taxes is not a judicial act; it partakes of no element of judicial character. It is a legislative act; it requires the exercise of a legislative

power, which for certain governmental purposes in the county may be devolved upon a board of supervisors, but cannot be delegated to any branch of the judicial department. *Hardenburgh* v. *Kidd*, 10 Cal. 403.

38. The provisions of the revenue act of 1853 and 1854, authorizing the court of sessions to assess a tax for county purposes, are unconstitutional, and the assessment made thereunder, and a subsequent levy upon and sale of property in the enforcement of such assessment, are void. *Ib.*

39. Property must at the time be liable for all the taxes for which it is sold; and where property was sold at one sale for both State and county taxes, added together in a single sum, and the county taxes were illegally levied, the entire sale was void. *Ib.* 404.

40. The listing and valuation of real estate for the purpose of taxation is an essential prerequisite to the validity of all subsequent proceedings. The assessmeut must be made by the assessor. *Ferris* v. *Coover*, 10 Cal. 632.

41. If no valuation was placed by the assessor upon the property, none can be placed upon it by the board of equalization. The board may alter the valuation in order to equalize it, but cannot place the valuation in the first instance. *Ib.*

42. By the doctrine of the common law, a party claiming under a tax deed must show that all the requirements of the law from the first to the last have been complied with. Though the statute has altered the rule and made the deed prima facie evidence of the conveyance of all the title of the delinquent, it does not dispense with the necessity of the officer reciting in the deed the authority under which he acted. The deed has no validity as an independent conveyance. It depends upon the statute, and if by any of its recitals it appears that any material requisition of the law has been omitted, the deed is void. *Ferris* v. *Coover*, 10 Cal. 632; *Lachman* v. *Clark*, 14 Cal. 133.

43. A tax payer cannot enjoin the collection of the tax due the county on the ground that he has in former years paid into the county treasury taxes assessed on his property, which were illegally assessed and collected. *Fremont* v. *Mariposa County*, 11 Cal. 362.

44. A sheriff, whose term of office has expired, has no right to collect the State and county tax as unfinished business from the assessment list which came into his hands while in office. *Fremont* v. *Boling*, 11 Cal. 389.

45. The taxes of 1855, after March, 1856, are not of the unfinished business of the outgoing sheriff, for the reason that after the settlement of the sheriff with the county auditor in March, the delinquent taxes of that year are transferred to the tax list of the succeeding year, and it is made the duty of the then sheriff to proceed to collect such delinquent tax as other taxes. *Ib.*

46. There is no irreconcilable conflict between the amendatory act of 1853 and the revenue acts of 1853 and 1854. The provision that the sheriff going out of office shall continue to collect the taxes coming to his hands before his term expired, was intended to provide for the period intervening between October and March, the time of his settlement. *Ib.* 390.

47. In such a case, the party who is about to be injured by the sale of his property has a right to an injunction against the person offering to sell to prevent the sale. *Ib.* 390.

48. The interest of the occupant of a mining claim is property, and under the constitution it is in the power of the legislature to tax such property. *State of California* v. *Moore*, 12 Cal. 69.

49. Several persons may have, in the same land, a property which is subject to taxation, and it is not perceived that the fact that the property of the government is exempt from taxation affects the right to tax the interest which the private individuals have acquired in the same property. Exemption from taxation is a privilege of the government, not an incident to the property. *Ib.* 71.

50. If the acquisition of the fee by a private person subjects the property to taxation, it follows that the acquisition of a lesser estate would equally subject such estate. *Ib.*

51. For the purposes of taxation there is no distinction between a thing and its value; it is the value which is assessed and upon which the tax is imposed, and an exemption of certain property from taxation exempts its value also. *Ib.* 72.

52. The legislature having expressly

exempted mining claims from the operation of the revenue act, it cannot be presumed that it intended indirectly to subject them to taxation by levying a tax on the price paid for them. *Ib.*

53. The constitution provides for equality and uniformity of taxation upon property, but applies only to that charge or imposition upon property which it is necessary to levy to raise funds to defray the expenses of the government of the State, or of some county or town. It has no reference to special assessments for local improvements, by which individual parties are chiefly benefitted in the increased value of their property, and in which the public is only to a limited extent interested. *Burnett* v. *City of Sacramento*, 12 Cal. 83.

54. For the expenses of such improvements, it is competent for the legislature to provide either by general taxation upon the property of all the inhabitants of the county or town in which they are made, or upon property adjacent thereto, and especially benefitted thereby. *Ib.* 84.

55. The power of apportionment, with the power of taxation, is exclusively in the legislature. The constitution contains no inhibition to the tax, and prescribes no rule of apportionment. *Ib.*

56. A stage company engaged in carrying passengers to and from Sacramento city, are liable to pay to the city a license tax under the provisions of section twenty-two of "an ordinance authorizing and regulating the issue of licenses and the collection of a license tax." *City of Sacramento* v. *California Stage Co.*, 12 Cal. 138.

57. The provisions of the revenue act of 1857, which requires the tax collector to publish the delinquent tax list, giving the name of the owner (when known) of all real estate and improvements, together with a condensed description of the property, etc., are not conditions precedent to the vesting of the tax. The obligation to pay the tax does not exist by the force of these provisions. The tax is a debt due from the property holder to the State, and these proceedings by publication, etc., are merely modes adopted by the legislature to collect them. If the property be omitted from the delinquent list, this does not discharge the property holder, but the defect may be remedied by the legislature. *Moore* v. *Patch*, 12 Cal. 270.

58. Where the legislature passed an act to remedy the failure on the part of the tax collector to publish the names of the owners, together with a list of the property, such act cannot be defeated upon the constitutional ground that it is not uniform in its operation. Such act is not general, but special, and is passed to meet a given state of facts, and consequently, that provision of our constitution which provides that "all laws of a general nature shall be uniform in their operation," does not apply. *Ib.* 271.

59. The act of 1858, dispensing with the publication of the delinquent tax required by the act of 1857, also dispensed with the proof of that fact. *Ib.* 272.

60. Taking the third section of the act of 1858, together with the first section, it is evident that the intention of the legislature in the passage of the act of 1858 was to substitute the assessment roll for the delinquent list required by the act of 1857, or rather to give full and complete effect to that list as a valid warrant for the collection of the taxes therein mentioned, and then to provide as is done in section three of that act for their collection. *Ib.*

61. A party seeking to enjoin the collection of a tax assessed upon his property upon the ground that the law provides for the meeting of the board of equalization for the correction of the tax list, and that the board did not meet as required, must show in his bill that there was error to be corrected in his list. *Cowell* v. *Doub*, 12 Cal. 274.

62. Nor can such party enjoin the collection of the tax upon the ground that notice was not given of the meeting of the board, as required by law, unless he shows that there was error in the assessed value of his property to his prejudice. *Ib.*

63. An injunction will not lie to restrain the collection of taxes due on property, unless it be shown that the injury resulting from the collection to the owner would be irreparable. An assessment of this character must appear in the bill, and if denied, it must be sustained at the hearing. *Ritter* v. *Patch*, 12 Cal. 299.

64. A tax is not a cloud upon the title to real estate; and its unlawful collection by distress or seizure of chattels is no more than an ordinary trespass. *Ib.*

65. Query: Whether a tax payer can interfere by injunction to restrain the per-

formance of a ministerial duty cast upon public officers by law, merely upon the ground that the effect at some future time, if certain other things be done, might be to subject his property to taxation. *Pattison* v. *Supervisors of Yuba County*, 13 Cal. 181.

66. The legislature has a right to authorize a location for the purpose of internal improvements; it may authorize the local authorities to impose the tax; this authority may be given upon petition, or without it, or by or without a submission of the proposition to the people, and it is not essential that the improvement should be within or conferred to the locality taxed, and a subscription of stock to be paid for by taxation is a valid contract to pay it. *Ib.* 189.

67. The only limitation upon the taxing power of the legislature, is the provision for equality and uniformity, found in the thirteenth section of article fourth of the constitution. *People* v. *Burr*, 13 Cal. 350.

68. The legislature can impose a general tax upon all the property of the State, or a local tax upon the property of particular subdivisions, as counties, cities and towns. The cases in which its powers shall be exercised, and the extent to which the taxation in a particular instance shall be carried, are matters exclusively within its own judgment, subject to the qualifications of equality and uniformity in the assessment. And, except as especially restricted, its power of appropriation of the moneys raised, is coëxtensive with its power of taxation. *Ib.* 357.

69. The fact that the legislature has once exercised its power in limiting the extent of taxation in municipal corporations, under the thirty-seventh section of article fourth of the constitution, does not prevent the legislature from again exercising its power by enlarging the authority to tax. *Ib.* 355.

70. An assessment for taxes must be made against the owner when known. The individual, and not the property, pays the tax. The property shows the amount of the tax with which to charge the owner, and is security for payment. *Kelsey* v. *Abbott*, 13 Cal. 617.

71. Where a party made defendant in a foreclosure suit, as claiming some interest in the land, sets up as a full defense a tax title, he cannot object afterward that equity has no jurisdiction over tax titles. *Ib.*

72. Proceedings in tax sales are strictissimi juris. The fact that a tax deed is prima facie evidence of certain facts, makes it none the less obligatory to comply strictly with the law. The deed simply shifts the burden of proof. *Ib.* 618.

73. A party in possession of premises under sheriff's sale, and receiving rents and profits during the time for redemption, should in equity, as between him and defendant in execution, pay the taxes so assessed while he is so in possession. If the owner does not pay them, then the statute requires the party in possession to pay. *Ib.* 619.

74. If in such case the party fail to pay the tax, permit the premises to be sold, and buy them in, he can derive no benefit from the sale, except that in equity the amount paid would properly be considered as advanced to the judgment debtor. And this, though the premises were bid in by one of two partners; while the possession under the sheriff's sale was by both partners. The duty to pay the tax was several as well as joint. *Ib.*

75. A foreign miner's license, though in some sense a tax, yet probably is not so in the sense involved in the necessary duties of a tax collector, as a tax on land or personal property. *People* v. *Squires*, 14 Cal. 18.

76. An assessment of property as "a ranch commonly known as Clark's ranch, situated on the Auburn road, two miles south of Grass Valley, in Nevada county, State of California," is insufficient, and a tax deed on a sale upon it is void. *Lachman* v. *Clark*, 14 Cal. 133.

77. Lands outside of a city or incorporated town must be described by metes and bounds, the number of acres as nearly as possible, and the locality and township must be given. *Ib.*

78. Under the second section of the revenue act of 1857, taxing all property within the State, except certain descriptions of property, among which are mining claims, a flume constructed by a mining company along the bank of a river leading to the claims of the company in the bed of the river, is not exempt. *Hart* v. *Plum*, 14 Cal. 153.

79. Under the consolidation act of 1858,

the board of supervisors of the city and county of Sacramento have the power to levy a license tax upon the business of a merchant, and to collect such tax by ordinary suit. *City of Sacramento* v. *Crocker*, 16 Cal. 122.

80. An ordinance graduating the amount of such tax according to the amount of the monthly sales of the merchant, is not unconstitutional because the tax is unequal. The tax is not on the goods, but on the business, and the provision for determining the amount of the tax is uniform and equal, applying to all persons in the same category. *Ib.*

81. Taxes not justly due, and paid under protest, may be recovered back by suit against the tax collector. *Falkner* v. *Hunt*, 16 Cal. 170.

82. A mortgage is not personal property within the revenue act of 1856, nor liable, *as such*, to taxation. *Ib.* 171

83. An assessment thus: "Mortgages (Marysville) $100,000," is insufficient under the act. The assessment does not show for what the mortgages were given, nor on what property, nor whether the debts were solvent, nor the value of the property mortgaged; and the sole fact that a mortgage is held for a given amount does not make the mortgage subject to taxation for so much money. *Ib.* 172.

84. Land mortgaged may be taxed without reference to the mortgage, and if the mortgage be to secure a debt, the debt may be taxed; if to secure a loan of money, the money may be taxed; but the act does not intend to tax the mortgage, *as such*, and also to tax the money loaned and secured by the mortgage, or the solvent debt it represents. *Ib.*

85. An assessment thus: "personal property—mortgages (Marysville) $100,000," is not good as an assessment of personal property, independent of the term "mortgages," on the ground that the act requires no description of personal property to be given, but its value only. The whole statement must be taken together, and that shows "mortgages" to be taxed, and they are not subject to taxation as such. *Ib.*

86. Prima facie, a mortgage is no more taxable than a deed or any other muniment of title or mere security, and the money which it secures cannot be taxed without a more particular description than the general designation, "personal property." *Ib.*

87. Under this act, a lumping assessment of "personal property" is bad. Every item of taxable property need not be listed, but the different classes named in the act should be stated—as goods, money loaned, gold dust, solvent debts. *Ib.*

88. A tax is a personal debt, or in the nature of a personal debt due from the property holder, and not a mere charge upon the property created by and depending upon the regularity of the proceedings given by statute; and the legislature may prescribe a mode of correcting an informal assessment. *People* v. *Seymour*, 16 Cal. 341.

89. The legislature has the power of taxation without restrictions as to mode or limitation as to time; and if, from accident or oversight, or remissness on the part of the tax payer, the time for payment has passed, or the mere mode of charging him has not been followed by the officers, the legislature may still compel him to pay. *Ib.* 342.

90. Though a man can only be made to pay a tax according to law, that law may be made as well at one time as another, or by one series of acts as another, and as well after an informal assessment, or no assessment, as before. *Ib.* 343.

91. The act of 1860, authorizing suit to be brought for the unpaid taxes of the years 1858 and 1859, in the city and county of Sacramento, and prohibiting the defendants from setting up in defense any informality in the levy or assessment of the tax, and making duly certified copies of the delinquent tax list, or the original or duplicate assessment rolls, evidence of the delinquency of the property assessed, of the amount of taxes due and unpaid, and that all the forms of law in relation to the levy and assessment have been complied with, is constitutional. *Ib.*

92. Such a law, making the assessment prima facie proof, merely affects the remedy, and is not therefore liable to any constitutional objection. *Ib.* 344.

93. Nor is the act unconstitutional because it compels the delinquent, if sued, to pay costs and percentage by way of attorney's fees, in addition to the tax assessed. *Ib.*

94. Nor is it any constitutional objection to the act that the delinquent tax list

for 1859 was not properly published. The liability to pay the tax assessed preceded the publication of the delinquent tax list, and suit, under the act of 1860, is based upon that liability. *Ib.* 345.

95. The tax levied in Sacramento county for the wagon road from the eastern boundary line of said county through El Dorado county to Carson Valley, under the act of 1858, and the tax for agricultural hall under the act of 1859, are constitutional. *Ib.* 3.

96. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his cotenant in possession to account for rents and profits received by him from tenants of the premises. From rents so received the tenant in posession may deduct the amounts paid for the taxes and for necessary and proper repairs and additions for the preservation and security of the building held in common during the the period for which the rents were collected. And where the building contained theater rooms, which were let from time to time, with the furniture thereof—as carpets, lamps and scenery—which furniture was the individual property of the tenant in possession, he is entitled, in the accounting, to a reasonable allowance, to be deducted from the rents, for the use of such furniture, when such use was required in order to let the premises themselves. But he is not entitled to allowances for the use of any individual property in connection with the premises not thus required, nor any allowances for his personal services in taking charge of the building, renting the same, and collecting the rents. *Goodenow* v. *Ewer*, 16 Cal. 472.

97. The duty imposed by the forty-ninth section of the revenue act of 1857, for selling goods at public auction, is not a tax on the auctioneer, but a tax on the sale of goods, or the proceeds of the sale —the auctioneer being made the collector of the State for the amount of the tax. *State of California* v. *Poulterer*, 16 Cal. 523.

98. This duty may be collected by action of debt by the State against the auctioneer; and the penal remedy afforded by the fifty-second section of the act is not an exclusive remedy. *Ib.*

99. The forty-ninth section of the act makes the auctioneer liable to pay this duty, and the meaning is that he shall be legally held to pay it. The fact that a bond is required of the auctioneer, conditioned for the performance of his duty, shows that the legislature did not mean to restrict his responsibility to the penal provision of the act—as the bond covers this duty of paying over the money to the State. *Ib.*

100. The criminal process of the fifty-second section is not a remedy provided by the statute for the payment of the duty imposed, but a mere provision for the punishment of those who violate the law. The remedy spoken of by the authorities as excluding any other remedy, means the process provided by the legislature, whereby the duty may be enforced. But under our act, the remedy is not such; for, after the party has been fined and imprisoned, the duty of paying over to the State the money in the hands of the auctioneer remains. *Ib.*

101. Under the act here, the auctioneer's liability does not depend upon his statement or exhibit of the sales made by him. The act creates a liability for the percentage, and the provision therein for the statement therein under oath is only a means for arriving at, or enforcing a settlement. If the auctioneer fail of his duty in making the statement, he is in no better situation than if he discharged it. *Ib.* 526.

102. Nor does the fact that the defendant was not licensed as an auctioneer, or did not give bond, defeat the action for the duty under the act. Having done the business, and acted openly as an auctioneer, he is estopped to deny the responsibilities of an auctioneer. He cannot plead his own wrongs in failing to comply with the law in bar of his responsibilities for violating its provisions. *Ib.* 532.

103. Under the act, it is the duty of the auctioneer each month to make the statement of the amount of his sales for the month preceding, and at that time to pay over to the State what is then due as per his statement. No demand of payment is necessary. The auctioneer, if he fail to make the statement or pay the money, is in default by his own act, and is a debtor to the State for the amount so due. *Ib.*

104. If the auctioneer, under this act, be merely the agent of the State to collect and pay over its dues on sales of goods, it

is doubtful whether his liability to the State for the duty imposed on such sales flows from the statute. By the common law, independent of any statute, such an agent would be responsible to his principal for the money so received. If the auctioneer chooses to put himself in this relation—that is, accepts and assumes this trust, his liability would seem not to flow from the statute, but, like that of any other custodian of funds, would arise from the general law defining the responsibilies of such agents. And the principle that, as the law had already fixed the liability from these facts, the particular remedy given by the statute would be merely cumulative, would seem to apply; but this point is not here decided. *Ib.*

105. An action of debt for taxes will not lie when the predicate of the action is a mere assessment upon property. Much depends upon the language of the act creating the tax. If the act merely impose a tax upon property, and provide a particular process for enforcement, as a sale of the property, no suit can be brought against the person to collect the tax. If a personal liability be imposed for the tax, and the act is silent as to the mode of enforcement, then an action would lie for the enforcement of the obligation; for the rule is general, that debt lies at common law to enforce a statutory duty, or penalty, or forfeiture. *Ib.*

TELEGRAPH.

1. Telegraph companies in contemplation of law are common carriers, and are subject to the rules of law governing the same. *Parks* v. *Alta California Telegraph Co.*, 13 Cal. 426.

2. Where A contracts with a telegraph company to have his dispatch transmitted, authorizing his agent to secure a debt due from a third party by attachment, and this service was so negligently performed that other creditors of the common debtor obtain the first attachment and exhaust the assets of the debtor, which would not have been the case had the telegraph company performed its contract within a reasonable time, the company is liable not only for the cost of the dispatch but for the amount of A's claim, which constitute the natural and proximate damages resulting from the breach of contract. *Ib.*

3. Where a telegraph company fails to transmit a message, upon compliance by the person contracting with it with the conditions required by section one hundred and fifty-four of the act of 1850, page three hundred and seventy, an action for the penalty given by the act lies in favor of such person. *Thurn* v. *Alta California Telegraph Co.*, 15 Cal. 474.

4. The sum to be recovered is a penalty for a breach of the duty to transmit the message, and the act is a penal law to be strictly construed. *Ib.* 475.

5. Under the above section, the person entitled to recover the penalty is the party who contracts or offers to contract for the transmission of the dispatch. He may, probably, do this by his agent or servant; but when the contract is made by a party as agent of another, in order to give the right of action to the principal, the fact of agency must be shown. *Ib.* 475.

6. Proof as follows: "I am superintendent of the California State telegraph company, and operator in their office at San Francisco. July 2d, plaintiff came to our office and delivered a message to be transmitted to Jackson, and paid for transmitting it there. The message was: 'Alta Express Co., Jackson: If you have package for me, forward immediately.' Signed 'C. Thurn.' In the margin of the message sent, were the words: 'F. July 2d.' Few words passed when the message was delivered; no express agreement that the California State Telegraph Co. should forward the message to Sacramento, and employ the Alta California Telegraph Co. to transmit it from there to Jackson. He must have known that we could not send it to Jackson, as we had no line there. I think there was something said about sending it by the defendants' line from Sacramento." C. Thurn, the plaintiff, sues the Alta Telegraph Co. for the penalty, under the one hundred and fifty-fourth section of the act of 1850, page three hundred and seventy: held, that under these facts, he is not the person making or offering to make the contract, within th
the act, and cannot recover; that the only contract proven is a contract by the State

Telegraph Co. to send the message or to have it sent; and a contract, on its part, to contract on its own account with the Alta Telegraph Co. to send the message. *Ib.* 475.

7. If the message, in this case, had not been transmitted, plaintiff might have held the State Telegraph Co. responsible. *Ib.* 476.

TENANT.

See LANDLORD AND TENANT, LEASE, RENT, TENANCY.

TENANCY.

1. Two corporations cannot hold as joint tenants, but may as tenants in common. *Dewitt* v. *City of San Francisco*, 2 Cal. 297.

2. A deed for "one-half of my lot," accompanied by proof that the grantor owned at the time but that lot, is not void for uncertainty, but is only a deed for an undivided one-half, and the grantee claims as tenant in common. *Lick* v. *O'Donnell*, 3 Cal. 63.

3. One tenant in common cannot sustain an action for forcible entry and detainer against his cotenant holding over. He must first resort to a partition of the land. *Ib.*

4. The homestead becomes a sort of joint tenancy, with the right of ownership as between husband and wife. *Taylor* v. *Hargous*, 4 Cal. 273.

5. Two or more several cotenants cannot join *in an action of ejectment. *De Johnson* v. *Sepulbeda*, 5 Cal. 151; *Throckmorton* v. *Burr*, 5 Cal. 400.

6. The statute does not contemplate that a homestead should be carved out of land held in joint tenancy, or by tenancy in common. *Wolf* v. *Fleischacker*, 5 Cal. 245; *Reynolds* v. *Pixley*, 6 Cal. 167; *Giblin* v. *Jordan*, 6 Cal. 417; *Kellersberger* v. *Kopp*, 6 Cal. 565.

7. Lands held by a husband, with his wife and child as tenants in common, are not subject to homestead rights under the laws of this State. *Giblin* v. *Jordan*, 6 Cal. 418.

8. If parties were tenants in common, and the defendant sold the chattels held in common and appropriated the proceeds to his own use, the remedy of the plaintiff is in trover, or by an action for money had and received, and an action for goods, wares and merchandise sold and delivered will not entitle him to a judgment. *Williams* v. *Chadbourne*, 6 Cal. 561.

9. Tenants in common of land are not bound by the acts of a cotenant in accepting a balance of the purchase money and promising a deed, after the right thereto had become forfeited. *Pearis* v. *Covillaud*, 6 Cal. 621.

10. One of several tenants in common has a right to sue alone for his moiety. *Covillaud* v. *Tanner*, 7 Cal. 40.

11. Joint tenants must join in an action for possession of land jointly held. The failure to do so is fatal to a recovery. *Dewey* v. *Lambier*, 7 Cal. 348.

12. Tenants in common, or partners, have a right to acquire their cotenants' or copartners' interest by purchase under an execution sale, there being nothing in their relations to forbid it. *Gunter* v. *Laffan*, 7 Cal. 593.

13. One joint tenant or tenant in common of a chattel cannot dispose of anything more than his own interest therein. *People* v. *Marshall*, 8 Cal. 51.

14. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Parke* v. *Kilham*, 8 Cal. 79.

15. The possession of one tenant in common is possession for all, but this possession in one for all ceases the moment it becomes adverse to the others. *Partridge* v. *McKinney*, 10 Cal. 184.

16. Tenants in common must sue separately for the recovery of real estate, and we know of no rule which would compel a party to divest himself of or alter his

*The statute of March 6th, 1857, (Statutes, p. 62) enables one or more tenants in common or joint tenants to sue jointly or separately.

estate, for the purpose of asserting his title thereto. *Welch* v. *Sullivan*, 8 Cal. 187.

17. Possession of one partner or tenant in common of a mining claim is the possession of all. *Waring* v. *Crow*, 11 Cal. 371.

18. Where the tenant in common or partner goes away and remains absent from the premises, leaving his associates in possession, it creates no presumption of abandonment, nor does his refusal to pay or delay in paying the expenses of the business or the assessments, create of itself a forfeiture. *Ib.*

19. The mere passive acquiescence of the other partners or tenants in common of a sale of the interest of the plaintiff by a party having no title, cannot confer any upon the vendee. *Ib.*

20. The fact that two or more persons join in the execution of a mortgage of lands does not raise a presumption that the estate mortgaged is joint property. *Bowen* v. *May*, 12 Cal. 357.

21. In order to constitute a joint estate of lands in two or more persons, such estate must be expressly declared as such in the conveyance, otherwise the estate conveyed will be held by the grantees as tenants in common. *Ib.*

22. In an action by a tenant in common against his cotenant, who is in the sole possession of the premises, to recover a share of the profits of the estate, a complaint which avers a tenancy in common between the parties, the sole and exclusive possession of the premises by the defendant, the receipt by him of the rents, issues and profits thereof; a demand by the plaintiff of an account of the same, and the payment of his share; the defendant's refusal, and that the rents, issues and profits amount to $84,000, is insufficient to support the action. *Pico* v. *Columbet*, 12 Cal. 419.

23. In such complaint there are no special circumstances alleged which withdraw the case from the ordinary remedies at law, and require the interposition of equity. The action is a common law action of account; and viewed in this light the complaint is fatally defective in not averring that the defendant occupied the premises upon any agreement with the plaintiff as receiver or bailiff of his share of the rents and profits. It is essential to a recovery that this circumstance exist, and equally essential to the complaint that it be alleged. *Ib.*

24. At common law, one tenant in common has no remedy against the other who exclusively occupies the premises and receives the entire profits, unless he is ousted of possession, when ejectment may be brought, or unless the other is acting as bailiff of his interest by agreement, when the action of account will lie. *Ib.*

25. The occupation by him, so long as he does not exclude his cotenant, is but the exercise of a legal right. His cultivation and improvements are made at his own risk; if they result in loss he cannot call upon his cotenant for contribution, and if they produce a profit his cotenant is not entitled to a share in them. The cotenant can at any moment enter into equal enjoyment of his possessions; his neglect to do so may be regarded as an assent to the sole occupation of the other. *Ib.* 420.

26. There is no equity in the claim asserted by the tenant, to share in profits resulting from the labor and money of his cotenant, when he has expended neither, and has never claimed possession, and never been liable for contribution in case of loss. There would be no equity in giving to a tenant who would neither work himself or subject himself to any expenditures or risks, a share in the fruits of another's labor, investments and risks. *Ib.* 422.

27. One tenant in common may sue a party in possession by adverse claim, and recover the premises, if plaintiff represents the better title. *Collier* v. *Corbett*, 15 Cal. 186.

28. One joint tenant or tenant in common of land may convey his interest in a particular portion of the land described by specific metes and bounds, but the grantee takes subject to the cotenant's right of partition of the whole tract. The grantee's title is good against his grantor and all persons except the cotenant. *Stark* v. *Barrett*, 15 Cal. 368.

29. The right of partition existing in the cotenant may be exercised at any time, and may result in the loss to the grantee of the particular parcel conveyed to him. *Ib.*

30. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his cotenant in possession to give account for

rents and profits received by him from tenants of the premises. *Goodenow* v. *Ewer*, 16 Cal. 471.

31. From rents so received, the tenant in possession may deduct the amounts paid for taxes and for necessary and proper repairs and additions for the preservation and security of the building held in common during the period for which the rents were collected. And where the building contained theater rooms, which were let from time to time with the furniture thereof—as carpets, lamps and scenery—which furniture was the individual property of the tenant in possession, he is entitled, in the accounting, to a reasonable allowance, to be deducted from the rents, for the use of such furniture, when such use was required in order to let the premises themselves. But he is not entitled to allowances for the use of any individual property in connection with the premises not thus required, nor any allowances for his personal services in taking charge of the building, renting the same, and collecting the rents. *Ib.* 472.

TENDER.

1. Where A had contracted verbally to convey to B a certain lot of land for $5,000, of which sum $1,000 was to be paid down, and the balance in two months, with interest at the rate of two per cent. a month, and the time for the payment of the $4,000 had elapsed long before the commencement of the suit: held, the plaintiff not having paid or tendered $4,000 with interest, that a specific performance ought not to be decreed. *Hoen* v. *Simmons*, 1 Cal. 121.

2. A agreed to convey to B a certain vessel, called the Mariposa, and B gave his promissory note for the consideration money, payable at a future day: held, that A being still the holder of the note, could not bring an action thereon, without showing that he had conveyed the vessel to B, or had tendered a conveyance; and held, further, that the tender of a bill of sale executed by A as attorney for C, the real owner, was neither performance nor an offer to perform. *Osborne* v. *Elliott*, 1 Cal. 338.

3. Where by an agreement for the sale or purchase of land, the price is payable in installments, for which the purchaser executes his notes, payable at certain times, and the vendor agrees to convey on payment of the last installment, the suit is brought on the notes after all the installments have become due; the tender of a conveyance by the vendor is a condition precedent to the right to sue, and the purchaser may insist on the want of such tender against an indorser after maturity. *Folsom* v. *Bartlett*, 2 Cal. 164.

4. A payment to the sheriff for the redemption of land sold cannot be tendered in certified checks. *People* v. *Hays*, 4 Cal. 152.

5. In an action for specific performance against a vendor who refused to make a title, it is not necessary that a deed should be tendered him for execution. *Goodale* v. *West*, 5 Cal. 341.

6. Where a party contracts for a quantity of wheat, to be delivered on demand and paid for on delivery, in an action for nondelivery it is unnecessary for plaintiff to aver and prove a tender of the purchase money at the time of demand or before suit. *Crosby* v. *Watkins*, 12 Cal. 88.

7. A tender of the money due on a bond and mortgage after the law day of the mortgage, and a refusal to accept the money, do not discharge the lien of the mortgage. *Perre* v. *Castro*, 14 Cal. 528.

8. In a suit by a vendor for specific performance of a contract of sale, the averment of tender of payment was in general terms, as that the tender had been repeatedly made, and that the plaintiff has been at all times and still is willing and ready to pay: held, that the tender should have been stated with greater particularity as to time, but that the objections in this respect cannot be taken for the first time in the supreme court. *Duff* v. *Fisher*, 15 Cal. 381.

9. Where plaintiff has two mortgages on the same property—the property being indivisible—and one of the mortgages is not due, he may, nevertheless, file his bill and have a decree for the foreclosure of both. And if the second mortgage becomes due before the decree, then defendant cannot defeat the action as to this mortgage by tendering the money due on

the first mortgage after the maturity of the second. The jurisdiction of the court over the subject matter having attached, the court should close the controversy by settling all things involved in the litigation. *Hawkins* v. *Hill*, 15 Cal. 500.

TESTIMONY.

See EVIDENCE.

THREATS.

1. Where the court below excluded from the jury evidence of threats on the part of the deceased against the life of defendant, and the record does not show the character of such threats, the supreme court will presume that such proof was properly excluded. Such threats may have been made, and might have been conditional and justifiable. *People* v. *Glenn*, 10 Cal. 37.

2. The mere fact that one man threatens to kill another, does not justify the latter in killing the former. The threats must be shown to have been communicated to the accused before they are admissible as evidence for him for any purpose, and then the effect and bearing of the testimony should be explained by the judge to the jury before the case is finally submitted to them. *People* v. *Arnold*, 15 Cal. 480.

3. Bill for an injunction to restrain defendants from taking possession of certain real estate— a warehouse and wharf. Complaint avers plaintiffs' title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed: held, that these allegations are insufficient to authorize an injunction— there being no averment of insolvency of defendants, and complaint not showing that there is no adequate remedy at law. *Tomlinson* v. *Rubio*, 16 Cal. 206.

4. In such case, forcible entry and detainer would be a speedy mode of regaining the possession, if taken by defendants, and for other damages the usual proceedings at law would suffice. That the premises are used in connection with the transportation business, which would be interrupted by the threatened trespass, is not alone a ground for equitable interference. *Ib.*

TIME.

1. If the appellants have been guilty of no laches in perfecting their appeal, the court may enlarge the time for them to file their bond, to entitle them to a stay of proceedings under the statute. *Bradley* v. *Hall*, 1 Cal. 199.

2. If no time be specified when a statute shall be in force, it ought to go into effect from and after its passage— that is, when its existence is perfected. *People* v. *Clark*, 1 Cal. 407.

3. To hold that a law operates all that part of the day of its passage prior thereto, is as absurd and as much of a fiction as the old doctrine that by relation it should commence running on the first day of parliament; therefore the hour of the approval of a statute is a fact to be ascertained and proved in all cases where the rights of parties are in any manner to be affected by the time of the approval. *Ib.*

4. Where the rights of parties are concerned, a day will not be considered a unit, but inquiry may be made as to the very point of time when an act is done. *People* v. *Clark*, 1 Cal. 407; *Craig* v. *Godfroy*, 1 Cal. 416; *People* v. *Beatty*, 14 Cal. 371.

5. A party must move for a new trial within the statute time, unless the same has been enlarged. *Dennison* v. *Smith*, 1 Cal. 438.

6. In the absence of any custom to the contrary, Tuesdays are computed in the calculation of lay days at the port of discharge, but where the contract specifies working lay days, Sundays and holidays are excluded in the computation. *Brooks* v. *Minturn*, 1 Cal. 483.

7. Loss of time caused by the failure of a party to perform his contract is not remote, but strictly proximate, and immediate damages ought to be allowed. *Kenyon* v. *Goodall*, 3 Cal. 259.

8. To create a forfeiture for nonpayment of rent, the rent must be demanded on the day it becomes due, and at a late hour of the day, and where the record shows no demand of the rent there can be no forfeiture. *Chipman* v. *Emeric*, 3 Cal. 283.

9. If a note is payable in bank, notice of nonpayment may be given to the indorser on the evening of the day on which the note is payable, after the close of banking hours, and if not payable in bank, notice may be given on the evening of the day it is payable, at the close of the usual hours of commercial business. In places where no regular hours of business exist, the notices may be given after sunset of the day of its dishonor. *Toothaker* v. *Cornwall*, 4 Cal. 30. See *McFarland* v. *Pico*, 8 Cal. 631.

10. After sentencing a prisoner, but before signing final judgment, the court had the prisoner brought before it and amended the sentence by shortening the time, it was held not to be error. *People* v. *Thompson*, 4 Cal. 241.

11. The time provided in which a jury shall be returned by the sheriff is directory, and not mandatory. *Mowry* v. *Starbuck*, 4 Cal. 275.

12. It is always within the power of a court, when exercising proper discretion, to extend the time fixed by law whenever the ends of justice would seem to demand such an extension. *Wood* v. *Forbes*, 5 Cal. 62.

13. An indictment is sufficiently certain as to time, if it appear from it that the offense was committed at some time prior to the finding of the indictment. *People* v. *Littlefield*, 5 Cal. 356.

14. In an action for unlawfully holding over after the expiration of the tenant's term, three days' notice is all that is required. *Garbrell* v. *Fitch*, 6 Cal. 189.

15. Where the commission of an offense is charged to have been on a particular day, which was anterior to the finding of an indictment, there is no necessity for the averment that the offense was committed before the finding of the indictment. *People* v. *Lafuente*, 6 Cal. 203.

16. Under our statute, an indictment for murder need not state the time when the crime was committed, except that it was before the finding of the indictment, and within one year and a day before death ensued from the wound or assault. *People* v. *Kelly*, 6 Cal. 212.

17. The time in which a sheriff makes return to an execution, does not affect the validity of the execution, or of a sale under it. *Low* v. *Adams*, 6 Cal. 281.

18. In the civil law, a mere nonperformance within a stipulated time does not, ipso facto, annul a contract, unless, indeed, time is the very essence of the contract. *Holliday* v. *West*, 6 Cal. 527.

19. Notice of time and place having been given, it is a matter of small importance who takes a deposition, particularly in view of the inconvenience and delay which would result from a different rule. *Williams* v. *Chadbourne*, 6 Cal. 561.

20. Though time is not of the essence of a contract for the sale of real estate, unless made so by the agreement of the parties, yet in every case it will devolve upon the party seeking relief, in a court of equity, to account for his delay. *Brown* v. *Covillaud*, 6 Cal. 571; *Green* v. *Covillaud*, 10 Cal. 330.

21. The date of publication of notice to creditors, under our insolvent act, is the first day on which such notice is published. *Clark* v. *Ray*, 6 Cal. 604.

22. The establishment and enforcement of rules limiting the argument of counsel to a certain time are matters resting on the sound discretion of the court; and, unless it appear that injustice has thereby been done, form no ground of appeal. *People* v. *Tock Chew*, 6 Cal. 636; *People* v. *Keenan*, 13 Cal. 584.

23. The consolidation act of San Francisco gives the officers named in the fourteenth section two days after the meeting of the board of supervisors in which to file new bonds. The meeting taking place

on the ninth of July, the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane* v. *Scannell*, 7 Cal. 395; *People* v. *Scannell*, 7 Cal. 436.

24. The limitation as to time applied only to the action of the incumbent. The board had a reasonable time allowed them in which to reject or approve the bonds presented. *Ib.*

25. In the case of an absent person, from whom no tidings are received, the presumption of life ceases at the end of seven years: to shorten this time there must be evidence of some specific peril to the life of the individual. *Ashbury* v. *Sanders*, 8 Cal. 64.

26. The fact that a fugitive from justice had not been heard of for sixteen months, and that he was a passenger on a particular vessel, bound for a specific port, and that neither the vessel nor crew had ever been heard from, is not sufficient to raise a legal presumption of his death. *Ib.*

27. The constitution provides that if any bill presented to the governor (having passed both houses of the legislature) shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall become a law in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return. *Price* v. *Whitman*, 8 Cal. 415, overruling *People* v. *Whitman*, 6 Cal. 660.

28. The ten days given by the constitution must be computed by excluding the day on which the bill is presented to the governor. *Price* v. *Whitman*, 8 Cal. 415.

29. Where it is necessary to give effect to contracts, and carry out the intention of parties, the first day is by the courts included or excluded, as the case requires, there appearing to be no uniform rule on the subject; but when a time for deliberation is allowed, the exclusive rule should be adopted. *Ib.* 417.

30. The presentment and demand of commercial paper, having days of grace, must be made within reasonable hours on the last day of grace, and what are reasonable hours will depend on the question whether or not the bill or note is payable at a bank or place where, by the established usages of trade, business transactions are limited to certain stated hours. *McFarland* v. *Pico*, 8 Cal. 631.

31. The line upon which a ditch is actually intended to be dug, should be run within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditch owners date back to the survey. What is a reasonable time must depend upon the circumstances of the case. *Park* v. *Kilham*, 8 Cal. 79.

32. In California, where such rapid and sudden fluctuations in the affairs and fortunes of men occurred, as in all history is unexampled, and where the work of years was accomplished in months, it is impossible to hold that time, as an element of past contracts, should be measured by the standards which obtain in old and settled States, where every thing is comparatively stable and permanent, where capital is abundant, titles ascertained and interest is low. *Green* v. *Covillaud*, 10 Cal. 331.

33. Where a party gave notice of the justification of the sureties on an undertaking before the clerk of the court below, on the second of November, between the hours of ten A. M., and five P. M., of that day: held, that the clerk acted properly in refusing to take their justification, the opposite party being absent until the last hour stated in the notice. *Lower* v. *Knox*, 10 Cal. 480.

34. When an indictment for murder is used as a substitute for, and in place of an indictment for manslaughter, it must, where time is material, contain the averment as to time which would be essential in an indictment for manslaughter. *People* v. *Miller*, 12 Cal. 294.

35. If defendant is out of the State a portion of the time, it must be so averred in the indictment. Prima facie, the lapse of time is a good defense, and where the statutory exception is relied on, it must be set up. *Ib.*

36. In a criminal case, if the court below impose upon counsel, without their consent, a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel that the prisoner was deprived by the limitation of the opportunity of a full defense, for this is his constitutional right, without which he cannot be lawfully convicted. *People* v. *Keenan*, 13 Cal. 584.

37. Paying part of a note when all is

due, is no consideration for an agreement to extend the time of payment. *Leining* v. *Gould*, 13 Cal. 599.

38. The provision of the revenue law that the assessment must be made on or before the first Monday of May is directory. And generally, when a time is fixed by statute, within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered directory unless the nature of the act to be performed, or the language of the legislature, shows that designation of the time was intended as a limitation of the power of the officer. *Hart* v. *Plum*, 14 Cal. 155.

39. The term of court is sufficiently stated in an indictment when the day on which the indictment was found is given. *People* v. *Beatty*, 14 Cal. 371.

40. When time is important, courts will inquire into a day, or fractional part of a day. *Ib.*

41. Time, though often a material ingredient in the evidence, is not an indispensable ingredient in the act of dedication of a street or highway. *Harding* v. *Jasper*, 14 Cal. 647.

42. The rule is, that when time is prescribed to a public body in the exercise of a function in which the public is concerned, the period designated is not of the essence of the authority, but is a mere directory provision. *People* v. *Murray*, 15 Cal. 223.

43. Provisions in a statute in regard to the time within which an act is required to be done, are generally to be construed to be directory; but such a construction is improper where a consequence is attached to a failure to comply with the statute. *Shaw* v. *Randall*, 15 Cal. 387.

44. Where a special term of the county court was held on the first day of May, upon notice to that effect given on the twenty-fourth of April preceding, the proceedings of the court were irregular, if not void, the statute requiring a notice of not less than ten, nor more than twenty days. *People* v. *Riley*, 16 Cal. 187.

TITLE.

I. In general.
II. Estoppel as to Title.

I. In general.

1. A possessory action cannot be maintained under the Mexican law by a person who has acquired title subsequent to the intrusion complained of. *Suñol* v. *Hepburn*, 1 Cal. 260.

2. The plaintiff not having the real and actual possession of the premises, can adduce no proof of possession other than through the medium of his title, and the defendant is allowed to dispute the validity of his title and retain possession if he fails to show a title under which he could possess. *Ib.* 272.

3. A party cannot, by the Mexican law, acquire possession beyond the metes and bounds of his actual occupancy, unless he claims to hold under what is termed a just title, and a deed void upon its face is not a just title. *Ib.* 285.

4. *A grant from an American alcalde during the continuance of the Mexican war is not evidence of title sufficient to maintain an ejectment without a definite and positive possession.* *Woodworth* v. *Fulton*, 1 Cal. 308; *Fisher* v. *Salmon*, 1 Cal. 414; *Reynolds* v. *West*, 1 Cal. 325; overruled in *Cohas* v. *Raisin*, 3 Cal. 450; *Welch* v. *Sullivan*, 8 Cal. 199, and *Hart* v. *Burnett*, 15 Cal. 616.

5. A grant of a fifty vara lot at the Mission Dolores by a Mexican alcalde in 1842, where the grantee took possession and occupied the lot, is a title under which a party may maintain ejectment. *Brown* v. *O'Connor*, 1 Cal. 418.

6. Where the title is inchoate and incomplete, one cannot sustain an ejectment, and the court should exclude such title as evidence. *Leese* v. *Clark*, 3 Cal. 27.

7. The defendant cannot introduce evidence to show that the title is in a third party, or that the fee of the land in question is in the United States, nor to impeach the validity of the conveyance to plaintiff collaterally as against third persons. *Winans* v. *Christy*, 4 Cal. 79.

8. The statute regulating sheriffs' sales

of real estate does not design to invest a purchaser with the title until six months after the sale. *Duprey* v. *Moran*, 4 Cal. 196.

9. A mere trespasser cannot set up an outstanding title in a third person. *Bequette* v. *Caulfield*, 4 Cal. 279; *Gregory* v. *Haynes*, 13 Cal. 595.

10. A claim of title by virtue of a sheriff's deed is insufficient, without showing the judgment which authorized the sale. *Sullivan* v. *Davis*, 4 Cal. 292.

11. An ordinary quitclaim deed is sufficient to enable the grantee to maintain ejectment if the grantor could have done so. *Ib.*

12. Where a plaintiff sues for a lot in a former pueblo of San Francisco, and deraigns his title from the city, it is prima facie evidence of title. *Seale* v. *Mitchell*, 5 Cal. 402.

13. A sale of land in the city of San Francisco by a portion of the board of commissioners of the funded debt does not pass a legal title upon which ejectment can be maintained. *Leonard* v. *Darlington*, 6 Cal. 124.

14. The writ of restitution obtained in an action of forcible entry and detainer does not determine either the right of property or the right of possession, and constitutes no defense to an action of ejectment. *Mitchell* v. *Hagood*, 6 Cal. 148.

15. In an action of ejectment under a Mexican grant: held, that the State court is bound to regard the decision of the United States supreme court, establishing the rule that a conditional grant from Mexico conveys a good title without performance of the conditions sufficient to maintain ejectment, and admissible to qualify the plaintiff's actual possession. *Gunn* v. *Bates*, 6 Cal. 271.

16. The objection that the deeds through which the plaintiff in ejectment deraigns title are not properly acknowledged, cannot be maintained by one who has had no privity with the plaintiff's grantors. *Welch* v. *Sullivan*, 8 Cal. 187.

17. A sale of the municipal land in the city of San Francisco, in 1852, on an execution issued under a judgment against the city rendered in 1851, conveyed a legal title to the land, upon which ejectment can be maintained. *Welch* v. *Sullivan*, 8 Cal. 187; *Hart* v. *Burnett*, 15 Cal. 616.

18. An outstanding title in a third person will defeat plaintiff's recovery in ejectment, although defendant does not connect himself with it. *Ib.* 198.

19. If a mere trespasser upon the prior actual possession of a party could justify his act by showing the true title in a third person, no party to the suit, then a prior possessor might never gain any repose by virtue of his adverse possession, and could never gain a title under the statute of limitations. *Bird* v. *Lisbros*, 9 Cal. 5.

20. A mere trespasser cannot show title in a third party as a general rule, but it is not of universal application. *Bird* v. *Lisbros*, 9 Cal. 5; *Piercy* v. *Sabin*, 10 Cal. 30.

21. When the plaintiff in ejectment does not rely on prior possession, but on his strict title, the defendant in possession having a good prima facie right may set up and show the true title to be in another party. *Bird* v. *Lisbros*, 9 Cal. 6.

22. An action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate cannot be maintained by the purchaser, who has taken possession of the premises sold under a conveyance with express covenants. *Peabody* v. *Phelps*, 8 Cal. 229.

23. All previous representations pending the negotiation for the purchase are merged in the conveyance. The instrument contains the final agreement of the parties, and by it, in the absence of fraud, their rights and liabilities are to be determined. *Ib.*

24. If a party takes a conveyance without covenants, he is without remedy in case of a failure of title; if he takes a conveyance with covenants, his remedy upon failure of title is confined to them. *Ib.*

25. Where the following instrument was endorsed on a deed, viz: Know all men by these presents, that I, the within named Avert M. Van Nostrand, of the city of San Francisco, State of California, in consideration of $8,000 paid to me by Rodman M. Price, of the city of New York, have assigned to the said Rodman M. Price and his assigns all my interest in the within instrument, and every clause, article or thing therein contained, and do hereby constitute the said Rodman M. Price my attorney in my name, but to his use, to take all legal measures that may be proper for the complete recovery and enjoyment of the assigned premises, with

the power of substitution. Witness my hand and seal, this thirtieth day of August, 1850, A. M. Van Nostrand; and such instrument was executed without the knowledge of the grantee named therein, and without any consideration therefor, and was not under seal: held, that the instrument did not pass the legal title to the premises, and created only an equity in the grantee. *Dupont* v. *Wertheman*, 10 Cal. 368.

26. The purchaser of an equitable title takes the property, subject to all existent equities. He is not within the rule which protects a bona fide purchaser for value, and without notice of the real or apparent legal title. *Ib.*

27. The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer of the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud* v. *El Dorado County*, 12 Cal. 133.

28. Under our system probably an action can be maintained upon any title, legal or equitable, or upon an instrument, sealed or unsealed, which entitles plaintiff to the possession of the property in dispute as against the defendants. *Ortman* v. *Dixon*, 13 Cal. 37.

29. A grant being of three leagues within a much larger area, and no survey having been made, gives no title to any specific three leagues of land, which would enable him to defend against ejectment on a patent. *Waterman* v. *Smith*, 13 Cal. 422.

30. A defendant in ejectment, entering under a deed executed by order of a court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set up an outstanding title in a third person. *Ib.*

31. S. and B., in 1854, execute a mortgage on their property to H. Subsequently, they execute another mortgage on the same property to plaintiff. Later, in 1855, S. conveys his interests to V., the deed declaring the interest to be sold subject to the two mortgages. Later, V. sells to defendant W., the deed containing the same recital as the last. In February, 1856, a decree of foreclosure of the first mortgage to H., sale of the property thereunder, defendant W. the purchaser, and in due time a sheriff's deed to him and possession. In June, 1856, foreclosure of the second mortgage to plaintiff, sale thereunder, plaintiff the purchaser; and in March, 1857, sheriff's deed to him: held, that plaintiff cannot maintain ejectment against defendant W. on his sheriff's deed; that defendant, claiming title through foreclosure of the first mortgage, and being in possession, cannot be dispossessed by B. *Brown* v. *Winter*, 14 Cal. 33.

32. At common law, a bond for title is in effect a mortgage. The legal title remains in the vendor, and an equity vests in the vendee, to have the title on compliance with the conditions. The legal title, as also the equity, goes to the whole estate, and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclosure. *Merritt* v. *Judd*, 14 Cal. 72.

33. Where defendants deny ownership in plaintiff, and set up ownership in themselves, it is not error to instruct the jury that the only question for them to determine is as to who has the better right to the premises. *Busenius* v. *Coffee*, 14 Cal. 93.

34. In suits for the possession of land by ditch companies incorporated under the act of April 14th, 1853, by the fourth section of which they are authorized to "purchase, hold, sell, and convey such real and personal estate as the purposes of the corporation shall require," the defendant cannot question the necessity of such land for the purposes of the corporation. This is matter between the government and the corporation. *Natoma W. & M. Co.* v. *Clarkin*, 14 Cal. 552.

35. If, on an executory contract for the purchase of land, made by plaintiff with the agent during the life of the principal, money due the principal was paid, after his death, to the agent, who settled the amount with the estate, so that the estate received the benefit of the payment, plaintiff would be entitled, in equity, to call for the legal title, and could defend in ejectment by the representatives of the principal. *Travers* v. *Crane*, 15 Cal. 20.

36. One tenant in common may sue a party in possession by adverse claim, and recover the premises, if plaintiff represents the better title. *Collier* v. *Corbett*, 15 Cal. 186.

37. A tract of land was held by several tenants in common, and, on partition, a certain portion was set apart and quitclaimed to plaintiff, representing M., who

had conveyed to plaintiff as security for endorsements. Another portion of the land was set apart and quitclaimed to H. The portion thus received by H. was subsequently conveyed to plaintiff, and embraces the land in controversy: held, that plaintiff is not mortgagee of the premises; that even if he hold the premises conveyed by H. to him as security for the endorsements of M., it was as trustee of the legal title; that the title had passed from H., and had never been in M., except of an undivided interest before the partition, and was therefore in plaintiff, who could maintain ejectment. *Seaward* v. *Malotte*, 15 Cal. 307.

38. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance on the first day of each month. November 1st, 1858, defendant, being in possession, denied plaintiff's title, and refused to pay rent. December 23d, 1858, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent. Defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers; denying, among other things, plaintiff's title, and his own relation of tenant: held, that plaintiff is entitled to recover, and that the denial of title and relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith* v. *Ogg Shaw*, 16 Cal. 89; 92.

39. R. & Co., defendants, had two mechanic's liens upon property; one filed October 30th, 1854, the other filed December 8th, 1854, against defendant V. In 1855, R. & Co. sign an entry on the record of liens, stating that the liens did not fall due till January 15th, 1856. This was done on the supposition that the act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16th, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and received a sheriff's deed. Plaintiff, as mortgagee of the property subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale on the ground of fraud: held, the only ground for the interposition of equity being fraud, and this being ignored by the findings, the bill is dismissed; but the decree will be confined to the disposition of the fraud alone, leaving plaintiff at liberty to pursue his remedy in ejectment, if he have any, without prejudice from this decree. *Gamble* v. *Voll*, 15 Cal. 510.

40. The city of San Francisco holds the municipal lands of the pueblo, not legally disposed of as hereinbefore explained; and her title is wholly unaffected by sheriff's sale under execution against her, so far as those sales touch or affect the aforesaid pueblo lands. A defendant in ejectment, holding such lands merely by possession, may set up the invalidity of such sales, or the plaintiff's title derived therefrom, to defeat the plaintiff's action. *Hart* v. *Burnett*, 15 Cal. 516.

41. The general rule that, in ejectment, the claimant must recover upon the strength of his own title, and not upon the weakness of his adversary's, and that his action will be defeated if defendant shows title out of him, and in a third party, has in this State been qualified and limited. *Coryell* v. *Cain*, 16 Cal. 572.

II. Estoppel as to Title.

42. If the plaintiff proves no title, the defendant, being in possession, cannot be ousted; but if defendant claims under the plaintiff, and in subordination to his title, he is estopped from questioning it. *Hoen* v. *Simmons*, 1 Cal. 120.

43. A person who enters into possession of land under another, cannot question the title of him under whom he holds. *Pierce* v. *Minturn*, 1 Cal. 472.

44. A defendant entering into possession under a bond for a deed from the plaintiff, cannot be considered as holding adversely from color of title. *Kilburn* v. *Ritchie*, 2 Cal. 148.

45. In an action of ejectment brought by a purchaser at sheriff's sale, under a

decree of foreclosure and sale of mortgaged premises, to recover the same against the mortgagor in possession, the mortgagor is estopped from setting up title in another as a defense to the action. *Redman* v. *Bellamy*, 4 Cal. 250.

46. In an action of ejectment, where the defendants acquired possession from the tenant of plaintiff, with a full knowledge of the tenancy, they are not in a position to deny plaintiff's title. *Anderson* v. *Parker*, 6 Cal. 199.

47. Where the plaintiff and defendant both derive title to land from the same person, the plaintiff is estopped by his purchase from denying the title of their common grantor, for the purpose of establishing title in himself by virtue of location of the land under school land warrants. *Ellis* v. *Jeans*, 7 Cal. 416.

48. In an action of ejectment, a tenant cannot deny the title of the vendor of his landlord. *McKune* v. *Montgomery*, 9 Cal. 576.

49. Where a defendant in ejectment brought upon a sheriff's deed, executed upon a purchase made on a sale under a decree of foreclosure, was also a party to the foreclosure suit, he is concluded by the decree from setting up a title which was in that adjudicated against him. *Clark* v. *Boyreau*, 14 Cal. 637.

50. In this case, which was ejectment for a lot purchased by plaintiffs of B., it was held that defendant had so recognized the title of B. as to be estopped from now disputing it. *Downer* v. *Ford*, 16 Cal. 350.

See EJECTMENT, GRANT, LAND.

TORT.

1. Where the master ejects the servant from his premises, the latter refusing to leave after being discharged and notified, the former should use no more force than is actually necessary to accomplish the object, in which case only nominal damages can be recovered. *De Briar* v. *Minturn*, 1 Cal. 450.

2. Vindictive damages may be given in a civil action for a personal injury, though the act be also punishable by a criminal prosecution. *Wilson* v. *Middleton*, 2 Cal. 56.

3. If the mortgagee acts in bad faith towards the owner, or is guilty of gross negligence, such as will greatly injure the owner, he is liable to such damages as a jury may assess. *Benham* v. *Rowe*, 2 Cal. 408.

4. A plaintiff has a right to waive a tort, as against factors, and to bring his action to compel them to account and for the net proceeds arising from the loss. *Lubert* v. *Chauviteau*, 3 Cal. 462.

5. A claim for damages for a personal tort cannot be united with a demand properly cognizable in a court of equity in the same action. *Mayo* v. *Madden*, 4 Cal. 28.

6. Intoxication of the plaintiff is no defense to an action for damages for injuries caused by falling through an uncovered hole in the sidewalk of a public street. *Robinson* v. *Pioche*, 5 Cal. 461.

7. A master is bound to use reasonable care and diligence to prevent accident or injury to his servant in the course of his employment, and if he fails so to do, he will be held responsible for damages. *Hallower* v. *Henley*, 6 Cal. 210.

8. A cause of action arising out of tort is not assignable. *Oliver* v. *Walsh*, 6 Cal. 456.

9. Where the sheriff wrongfully took possession of the goods and thereby deprived the plaintiff of them, the fact that they were taken by the coroner under a writ against the sheriff before the latter had removed them does not excuse his tort. *Squires* v. *Payne*, 6 Cal. 659.

10. Where a part owner sues ex delicto, and the objection of defect of parties is not set up in the answer, the damages should be apportioned at the trial. *Whitney* v. *Stark*, 8 Cal. 516.

11. Where personal property is tortiously taken, the party aggrieved may waive the tort and sue in assumpsit for the value of the property. *Fratt* v. *Clark*, 12 Cal. 90.

See TRESPASS.

TOWING.

1. It seems that the towing a vessel out to sea by a steamer is the transportation

of property so as to bring the case within the law of common carriers. *White* v. *Steam Tug Mary Ann*, 6 Cal. 471.

2. The fact that a vessel lost while being towed out to sea is insured, does not divest the owner of the right of action for damages for her loss, especially in the case of a mere partial insurance; for in such a case the abandonment by the owner only transfers his interest so far as that interest is covered by the policy. *Ib.*

3. A recovery by the owner in such an action will bar another action for the same cause, and therefore the defendant cannot raise the objection that the action is not brought by the real party in interest. *Ib.*

4. Whether a steam tug is a common carrier or not, she holds herself out to the world for engagement in a business for hire, requiring prudence, skill and the use of adequate means to perform the contracts which she undertakes, and this constitutes a stipulation of their existence, which by clear construction enters into the contract and forms part of it. *Ib.*

5. The fact that the owner of the ship lost while being towed to sea was the agent for the owners of the steam tug, does not release the latter from any of the obligations under which they contract with others. *Ib.*

TREASURER.

1. The act requiring the treasurer to retain certain moneys, approved January 27th, 1852, does not affect money in the treasury prior to its approval. *McDougal* v. *Roman*, 2 Cal. 80.

2. Where the State has passed an act to fund the indebtedness of a county, the holder of warrants on the county treasurer is not compelled to accept bonds for them, or, in other words, to fund them: they are simply left unprovided for in any other way. *Hunsacker* v. *Borden*, 5 Cal. 289.

3. Under the statute respecting county treasurers, passed March 22d, 1850, the party who registers his warrants becomes a preferred creditor, and is to be paid as soon as there are sufficient funds in the treasury and the prior registered warrants are paid. *Taylor* v. *Brooks*, 5 Cal. 332; *McCall* v. *Harris*, 6 Cal. 283; *Laforge* v. *Magee*, 6 Cal. 285; *McDonald* v. *Maddux*, 11 Cal. 190.

4. The act creating the office of county treasurer provides that the warrants drawn on the treasury shall be paid in the order of their registry, and this order of payment cannot be changed by the supervisors. *Laforge* v. *Magee*, 6 Cal. 285.

5. The revenue law of 1854 authorized the payment of a portion of the taxes in controller's warrants. The acts of 1855 and 1856 provide for the funding of the State debt, and the collection of the revenue in cash, and forbid the treasurer to liquidate any of the debt except as herein required: held, that the act of 1854, allowing payment in warrants, was thereby repealed. *Scofield* v. *White*, 7 Cal. 400.

6. The acceptance by a collector of taxes of a warrant is not a liquidation of the debt, but the receipt of it by the State treasurer from the collector would be a liquidation, for which the treasurer would be responsible. *Ib.* 401.

7. In the absence of an unexhausted specific appropriation to meet a warrant of the controller on the State treasurer, a warrant on the treasurer is absolutely void. *Butler* v. *Bates*, 7 Cal. 137.

8. The board of supervisors of a county cannot settle with the county treasurer at a special meeting of such board, unless they have first given notice of such meeting and specified in the notice that such business will be transacted. *El Dorado County* v. *Reed*, 11 Cal. 131.

9. In order to give the amplest opportunity to the district attorney, or citizens who desire to do so, to contest the allowance of improper demands against the public treasury, the business of the supervisors is required to be transacted at the regular meetings required by law, or if at special meetings, public notice must be given of the business to be so transacted, and unless such notice is given, the acts of the supervisors are a nullity. *Ib.* 132.

10. The county has no power to direct and authorize the treasurer to pay warrants in violation of the provisions of the statute. *McDonald* v. *Maddux*, 11 Cal. 189.

11. A mandamus will not lie against a county treasurer to compel him to pay in-

terest due on county bonds. *People* v. *Fogg*, 11 Cal. 359.

12. A treasurer is not, in respect to interest money, placed in any direct relation with the creditors; and he is not intrusted with a mere ministerial duty of holding it or paying it to them on demand. *Ib.*

13. Under the consolidation act of 1858, the treasurer of the city and county of Sacramento is entitled to receive for his official services only $3,000 per annum. He is not entitled to the percentage allowed by the State to county treasurers for the money paid by them into the State treasury. This percentage belongs to the city and county of Sacramento. *City of Sacramento* v. *Bird*, 15 Cal. 295.

TREATIES.

1. The power of taxation over aliens, and the conditions on which they shall be determined to enjoy the protection of the State in a particular place or occupation, cannot be taken away or impaired by acts of Congress or treaties with foreign nations, and the justice or expediency of the tax must be left to the States, subject to the restrictions which may be imposed by their organic law. *People* v. *Naglee*, 1 Cal. 248.

2. The treaty of Queretaro defined that all Mexicans established in California on the 30th day of May, 1848, and who had not on or before the 30th day of May, 1849, declared their intention to become Mexican citizens, are to be deemed American citizens, and laws applicable to aliens will not apply to them. *Ib.* 251.

3. A grant by a Mexican officer, duly authorized, and made in accordance with the Mexican laws applicable to California, and before the acquisition of the country by the Americans, is a title protected by the laws of nations, as well as by the treaty of Queretaro, and cannot be disturbed. *Reynolds* v. *West*, 1 Cal. 325.

4. Treaties made by the United States, removing the disability of aliens to inherit, are valid, and within the intent of the constitution of the United States. *People* v. *Gerke*, 5 Cal. 382.

5. The treaty between the United States and the Hanseatic towns has not enlarged the rights of natives of those towns in this respect, as the treaty only gives them the right to dispose of land which they are prevented from inheriting by their character as aliens. *Siemssen* v. *Bofer*, 6 Cal. 252.

6. The power of Congress to regulate commerce with foreign nations and among the States is an exclusive power, and the statute of this State, levying a tax of fifty dollars each on Chinese passengers, is invalid and void. *People* v. *Downer*, 7 Cal. 171.

7. Under the treaty between the United States and China, of July 3d, 1844, and the act of Congress carrying it into effect, the United States commissioner and consul constitute a judiciary for the government of the citizens of the United States in China, and are governed by the law of nations, the laws of the United States, the common law, and the "decrees and regulations" of the commissioner, until modified and amended by Congress; and such a judicial system is constitutional. *Forbes* v. *Scannell*, 13 Cal. 281.

TREES.

1. An action of trover may be maintained against a trespasser who is cutting timber, as soon as the tree is cut. *Sampson* v. *Hammond*, 4 Cal. 184.

2. An injunction will not be dissolved restraining defendants from felling trees, where the question of boundary is in dispute, especially when the plaintiffs' bond will fully protect the defendant for any delay, if it should turn out that they have the right. *Buckelew* v. *Estell*, 5 Cal. 108.

3. In an action for damages for cutting down growing trees, the measure of damages is not the value of the trees as fire wood, but the injury done to the land by destroying them. *Chipman* v. *Hibberd*, 6 Cal. 162.

4. The damage should be estimated by all the circumstances, and the purpose for which such trees were used or designed, and not according to the speculative or fancied ideas of the jury. *Ib.*

5. Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of the title, an injunction will not be granted on the application of a party claiming title to the land to prevent the defendant from cutting timber thereon. *Smith* v. *Wilson*, 10 Cal. 528.

6. Where the defendant conveyed by deed to plaintiff a tract of land, and there was subsequently a dispute between the parties respecting the boundary line of the land so conveyed, and the parties subsequently made an agreement fixing the line: held, that in an action of trespass by the plaintiff against the defendant for cutting timber upon the land previous to such agreement, the defendant was not estopped by the agreement in showing title in himself previous thereto. It was competent for the defendant to show that the deed did not embrace the locus in quo, and it was error for the court to instruct the jury that the delivery of the deed and the cutting of firewood on the tract was sufficient evidence of possession. The cutting of timber by itself was neither possession or title as against the owner. *Stockton* v. *Garfrias*, 12 Cal. 316.

7. A complaint in replevin, alleging that F. was seized and possessed of certain premises at the time of his death; that the plaintiffs were appointed the executors of his last will and testament, and ever since their appointment have been in possession of the premises; that certain persons, whose names are not designated, entered upon the same without authority, and cut down timber growing thereon, to the amount of about three hundred cords; that the defendant afterwards also entered upon the premises, without authority, and removed the wood thus cut, and still detains it from the plaintiffs; that they have demanded the possession of the same from him, and that he refuses to deliver it to them, to their damage of $1,100—the alleged value of the wood—sufficiently shows plaintiff's ownership of the wood. *Halleck* v. *Mixer*, 16 Cal. 578.

8. The averments, in such complaint, of "unlawful and wrongful," as applied to the entry upon the premises and the cutting down of the timber, and to his removal and detention of the same, may be stricken out as surplusage. *Ib.*

9. Against the cutting of timber, the owner of real property is entitled to the preventive remedy of injunction. Whilst the timber is growing, it is part of the realty, and its destruction constitutes that kind of waste the commission of which a court of equity will, upon petition, restrain. When once cut, the character of the property is changed; it has ceased to be a part of the realty, and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it in whosesoever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot find the property to enforce its specific return, he may waive the wrong in its removal and use, and sue for the value as upon an implied contract of sale. *Ib.*

10. In suits for damages for timber cut and removed, as in this case, the true rule, so far as the title to the land is concerned, is this: The plaintiff out of possession cannot sue for the property severed from the freehold, when the defendant was in possession of the premises from which the property was severed—holding them adversely, in good faith, under claim and color of title—in other words, the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants. *Ib.* 579.

11. But this rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is upon such proof that the right of recovery rests. It is because the plaintiff owns the premises, or has the right to their possession, that he is entitled to the chattel which is severed, and that must be in the first instance established. A mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action. *Ib.*

TRESPASS.

I. In general.
II. Damages in Trespass.
III. Injunction to Restrain Trespass.

I. In general.

1. A trespass dies with the trespasser, and cannot be pursued against an administrator. *O'Connor* v. *Corbitt*, 3 Cal. 373.

2. An action of trespass may be maintained against a trespasser who is cutting timber, as soon as the timber is cut. *Sampson* v. *Hammond*, 4 Cal. 184.

3. In an action for nuisance, or trespass, the defendant has no right to inquire into the good faith of the plaintiff's possession. *Eberhard* v. *Tuolumne Water Co.*, 4 Cal. 308.

4. The plaintiff sued in assumpsit to recover rent for premises, the possession of which he had previously recovered by ejectment against the defendant. After a trial and verdict, which was set aside by the court, he amended his complaint to make it in form of an action of trespass for mesne profits: held, that this was erroneous, and should not have been permitted. *Ramirez* v. *Murray*, 5 Cal. 223.

5. In an action of trespass against a sheriff, where he is declared against personally, and not as sheriff, it is competent to prove that the defendant was sheriff, and that his deputy, as such, committed the trespass. *Poinsett* v. *Taylor*, 6 Cal. 79.

6. The fact that the parties in possession of a gold mine are foreigners, and have not obtained a license, affords no apology for trespass. *Mitchell* v. *Hagood*, 6 Cal. 148.

7. A defendant who has not been served with process is not a competent witness for his codefendant in an action of trespass. *Gates* v. *Nash*, 6 Cal. 194.

8. Where several defendants are declared against jointly, but no joint trespass is proved, the plaintiff can introduce evidence of a several trespass against one of the defendants, and recover against such defendant; aliter if a joint trespass has been proved. *Mc Carron* v. *O'Connell*, 7 Cal. 153.

9. The owner of property in the possession of the same has a right to use so much force as is necessary to prevent a forcible trespass. *People* v. *Payne*, 8 Cal. 343; *People* v. *Honshell*, 10 Cal. 87.

10. Where a trespasser goes with the intent and means to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel force with force. *People* v. *Payne*, 8 Cal. 343.

11. A mere trespasser cannot show title in a third party. This is, no doubt, true as a general proposition, but it is not of universal application. *Bird* v. *Lisbros*, 9 Cal. 5.

12. If a mere trespasser upon the prior actual possession of a party could justify his act by showing the true title outstanding in a third party to the suit, then a prior possessor might never gain any repose by virtue of his adverse possession, and could never gain a title under the statute of limitations. *Ib.*

13. If the trustee does a wrongful act, then he, by doing the act, consents to be treated as a trespasser or debtor, at the option of the cestui que trust. *Gunter* v. *Janes*, 9 Cal. 659.

14. The lines of a quarter section of government land, which are distinctly marked by natural boundaries, and stakes placed at convenient distances so that the lines can be readily traced, are sufficient to authorize the occupant to maintain an action for a trespass thereon, under the act of April 11th, 1850. *Taylor* v. *Woodward*, 10 Cal. 91.

15. In an action for a trespass upon land alleged by the complaint to be in the possession of the plaintiff at the time of the unlawful entry thereon by the defendants, it is not a sufficient traverse of the allegation of posession for the defendants to aver in their answer that to the best of their information and belief they did not commit the grievance upon any land in the lawful possession of plaintiff. *Mc Cormick* v. *Bailey*, 10 Cal. 232.

16. The lessor of plaintiff is a competent witness in an action of trespass to the leased premises, where the lease does not bind him to protect the plaintiff against trespassers. *Ib.*

17. The statute making possessory rights of settlers on public lands for agricultural or grazing purposes yield to the rights of miners, has legalized what would otherwise be a trespass, and the act cannot be extended, by implication, to a class of cases not especially provided for. *Weimer* v. *Lowery*, 10 Cal. 112.

18. In an action of trespass for entering upon the mining ground of plaintiff, and digging the same up and converting the gold-bearing earth, the vendor of plaint-

iff is a competent witness, although a part of the purchase money is still due him. *Rowe* v. *Bradley*, 12 Cal. 230.

19. An officer, when he puts a receiver in possession of the property of another against whom he has no process, or asserts through himself, or another, an unlawful dominion over such property, is a trespasser. *Ib.*

20. No ouster is necessary to maintain an action of trespass; any unlawful entry is enough. *Ib.*

21. Where defendant conveyed by deed to plaintiff a tract of land, and there was subsequently a dispute between the parties respecting the boundary line of the land so conveyed, and the parties subsequently made an agreement fixing the line: held, that in an action of trespass by the plaintiff against the defendant for cutting timber upon the land previous to such agreement the defendant was not estopped by the agreement in showing title in himself previous thereto. It was competent for the defendant to show that the deed did not embrace the locus in quo. *Stockton* v. *Garfrias*, 12 Cal. 316.

22. In an action against a sheriff for seizing and selling certain personal property alleged to belong to plaintiff, under an execution against one Teal, it being averred in the answer that the property belonged to Teal: held, that evidence tending to prove that it was partnership property of Teal and plaintiff was proper, and that if they were partners, and as such owned the property, plaintiff could not recover. *Hughes* v. *Boring*, 16 Cal. 82.

23. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance, on the first day of each month. November 1st, 1858, defendant being in possession, denied plaintiff's title, and refused to pay rent. December 23d, 1857, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent; defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers, denying, among other things, plaintiff's title and his own relation of tenant: held, that plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith* v. *Ogg Shaw*, 16 Cal. 89; 92.

II. Damages in Trespass.

24. An action cannot be commenced against A to recover damages for a trespass to real estate committed by B. *Stevenson* v. *Lick*, 1 Cal. 129.

25. In an action by A against a sheriff for seizing the property of A on an execution against B: held, that no demand was necessary before bringing suit. *Ledley* v. *Hays*, 1 Cal. 161.

26. A municipal corporation is not liable in damages for the destruction of a building in pursuance of the directions of its officers, as in the case of a conflagration, where no statute exists creating such liability. *Dunbar* v. *City of San Francisco*, 1 Cal. 356.

27. The destruction of property to check a conflagration must be shown to be clearly necessitous; yet the individual must be regulated by his own judgment, and if done without actual or apparent necessity he is liable for trespass. *Surroceo* v. *Geary*, 3 Cal. 74.

28. In a complaint for trespass the plaintiff claimed five hundred dollars, the alleged value of the property destroyed, and five hundred dollars damages; defendant demurred on the ground that two causes of action were improperly joined, and the court below sustained the demurrer: held, that this was error. *Tendesen* v. *Marshall*, 3 Cal. 440.

29. In an action of trespass, the question of damages is a question particularly for the determination of a jury. *Drake* v. *Palmer*, 4 Cal. 11.

30. Justices of the peace have no jurisdiction in actions to recover damages for injury to a mining claim, or for its detention, when the amount involved is over two hundred dollars. *Van Etten* v. *Jilson*, 6 Cal. 19.

31. In an action to abate a nuisance, damages are only an incident to an action,

and the failure to recover two hundred dollars does not affect the question of costs. *Hudson* v. *Doyle*, 6 Cal. 102.

32. In an action for damages for cutting down growing trees, the measure of damages is not the value of the trees as firewood, but the injury done to the land by destroying them, considering the purposes for which such trees were used or designed, and not according to the speculative or fancied ideas of the jury. *Chipman* v. *Hibberd*, 6 Cal. 162.

33. Damages assessed for the value of land taken for a railroad should be paid to the true owner, if he recovers possession before the damages are paid by the company; although at the time of the damage a trespasser was in possession, who had filed his claim to the damages. *Rooney* v. *Sacramento Valley R. R. Co.*, 6 Cal. 640.

34. Where parties have located mining claims upon the bank of a creek or stream, and are using the bed of said stream for the purpose of working their claims, any subsequent erection, dam or embankment, which will turn the water back upon said claims, or hinder them from being worked with flumes or other necessary means or appliances, is an encroachment upon the rights of said parties, and they are entitled to recover for the damages consequent on such obstruction. *Sims* v. *Smith*, 7 Cal. 150.

35. Possession in the plaintiff is sufficient to enable him to maintain trespass; and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages. *McCarron* v. *O'Connell*, 7 Cal. 153.

36. A writ of injunction will lie to restrain trespass or entering upon a mining claim and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy for damages at law. *Merced Mining Co.* v. *Fremont*, 7 Cal. 327.

37. Where parties employed architects, reputed to be skilled in their profession, to construct at a designated point on a creek a dam or embankment of certain specified dimensions, capable of resisting all floods and freshets of the stream for the period of two years, and to deliver it completed by a given time; and before the embankment was completed it was broken by a sudden freshet, and a large body of water confined by it rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs with their stock of merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiff having brought suit to recover the damage sustained by them against the employers and contractors: held, that the latter alone were liable. *Boswell* v. *Laird*, 8 Cal. 489.

38. In an action against a sheriff for wrongfully seizing and selling property under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. *Phelps* v. *Owens*, 11 Cal. 24.

39. In an action for damages for the diversion of water from the plaintiff's ditch, the deposition of one of the owners of the ditch was taken by plaintiff, and subsequently and before the trial the witness conveyed, by deed, his interest in the ditch to plaintiff: held, that such deed of conveyance did not pass the witness' right to the damages, and hence he was an incompetent witness. *Kimball* v. *Gearhart*, 12 Cal. 47.

40. In an action for injuries to a mining claim, a claim for damages to the plaintiff by the reason of the breaking away of the defendant's dam, and the consequent washing away of the pay dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler* v. *Sears' Union Water Co.*, 12 Cal. 557.

41. The want of reasonable care on the part of another, who is injured by the breaking of a dam, cannot be set up in defense to an action for damages for injuries thus suffered. *Ib.* 559.

42. In an action for damages for diverting the water of a river from plaintiff's mill, an averment in the complaint of possession of the land and mill is sufficient against a trespasser, without averring riparian ownership, or prior appropriation of the water. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 13 Cal. 230.

43. Action for damages against defend-

ants, averring that they, "with force and arms, broke and entered upon the premises of plaintiff, and damaged them by causing them to be overflowed and covered with earth, gravel, tailings, etc., deposited thereon by the action of running water:" held, that under our system of pleadings the words "with force and arms, broke and entered," do not confine the proof to the direct and immediate damage as in the old action of trespass; that the facts being clearly set out in the complaint, the addition of these words was surplusage. *Darst* v. *Rush*, 14 Cal. 84.

44. In an action for damages against a constable for illegal seizure of plaintiff's property, the judgment was for six hundred and fifty dollars, the sum claimed in the complaint, the value of the property being therein fixed at four hundred and fifty dollars and the damages at two hundred dollars. The court found the damages at six hundred and fifty dollars. There was no statement on new trial or appeal: held, that the finding of the court is conclusive, and that the judgment must stand. *Van Pelt* v. *Littler*, 14 Cal. 201.

45. In actions, for taking and detaining personal property, no circumstances of aggravation being shown, the measure of damages is the value of the property with interest. *Dorsey* v. *Manlove*, 14 Cal. 555.

46. If circumstances of aggravation be shown in order to increase the damages, then defendant may show all circumstances connected with his acts and explanatory of his motives and intentions. *Ib.*

47. In such actions the rule of damages depends on the presence or absence of circumstances of aggravation in the trespass—as fraud, malice or oppression. *Ib.* 556.

48. Where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the rule of mere compensation is not enforced, and the measure and amount of damages are matters for the jury alone, and they may award punitive or exemplary damages. *Ib.* 558.

49. The rule of compensation, as distinguished from the rule of exemplary damages, applies even though the writ under which the officer committed the trespass was void—there being no circumstances of aggravation. *Ib.*

50. In an action to recover damages for the diversion of the water of a stream from plaintiff's mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiff claimed to be entitled, is an immaterial averment, and a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed so as to be res judicata in a subsequent suit. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 15 Cal. 149.

51. In such action for damages no issue could be taken upon the averment as to the particular quantity of water diverted. *Ib.*

52. In an action against a water company, incorporated under the laws of this State, for overflowing plaintiff's claim, the fact that plaintiff could have prevented the damage by pulling off a board from defendant's flume, and permitting the water to discharge above plaintiff's claim, is no defense, because they were not obliged to avoid the injuries complained of by committing a trespass. *Wolf* v. *St. Louis Independent Water Co.*, 15 Cal. 320.

See DAMAGES.

III. INJUNCTION TO RESTRAIN TRESPASS.

53. An injunction will not be dissolved restraining defendants from felling trees where the question of boundary is in dispute, especially as the plaintiffs' bond will fully protect the defendants from any delay, if it should turn out that they have the right. *Buckelew* v. *Estell*, 5 Cal. 108.

54. Questions as to the performance of the conditions contained in the grant can only be made by the grantor, and not by a mere naked trespasser; and an injunction will lie to restrain the trespass, where the grant is admitted. *Ib.*

55. An injunction ought not to be granted in aid of an action of trespass, unless it appear that the injury will be irreparable and cannot be compensated in damages. *Waldron* v. *Marsh*, 5 Cal. 119.

56. A complaint which sets out a cause of action in trespass, and concludes with a prayer for an injunction, is correct. *Gates* v. *Kieff*, 7 Cal. 125.

57. A complaint which joins an action

of "trespass quare clausum fregit," ejectment, and prayer for an injunction, will be held bad on demurrer. *Bigelow* v. *Gove*, 7 Cal. 135.

58. A writ of injunction will lie to restrain trespass in entering upon a mining claim and removing the auriferous quartz from it, where the injury threatens to be continuous and irreparable. *Merced Mining Co.* v. *Fremont*, 7 Cal. 320.

59. The removal of gold from a mine is emphatically taking away the entire substance of the estate, and comes within that class of trespass in which injunctions are now universally granted. *Ib.* 321.

60. Where the complaint alleged that the defendants had dug a mining ditch above one previously constructed by the plaintiffs, and had thereby diverted the water of the stream from plaintiffs' ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued: held, that it was sufficient for the recovery of damages, but not to sustain an injunction. *Coker* v. *Simpson*, 7 Cal. 341.

61. Where a suit is brought to test the question as to the propriety of appropriation of water, a prayer for an injunction to prevent future injury is proper. *Marius* v. *Bicknell*, 10 Cal. 224.

62. The remedy by injunction to restrain the removal of fixtures, under section two hundred and sixty-one of the code, is only preventive; it is not exclusive of any other remedy. *Sands* v. *Pfeiffer*, 10 Cal. 265.

63. Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted, on the application of a party claiming title to the land, to prevent the defendant from cutting timber thereon. *Smith* v. *Wilson*, 10 Cal. 528.

64. Where the bill avers that plaintiffs are the owners and in possession of a tract of land, that defendants are insolvent and threaten to and will enter upon said land, and by excavations, embankments and diverting valuable springs and streams thereon, despoil it of the substance of the inheritance and create a cloud upon plaintiff's title, injunction lies. *Bensley* v. *Mountain Lake W. Co.*, 13 Cal. 313.

65. Where premises containing deposits of gold are held under a patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil, and flooding a portion of the premises for the purpose of extracting the gold. *Boggs* v. *Merced Mining Co.*, 14 Cal. 379; *Henshaw* v. *Clark*, 14 Cal. 464.

66. In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass, in the nature of waste pending the action, but the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought. *Natoma W. and M. Co.* v. *Clarkin*, 14 Cal. 548.

67. The complaint avers title in plaintiff to a tract of land, that the possession of defendants is forcible and unlawful, that an action for forcible entry has been commenced by plaintiff against defendants, and is still pending and undetermined, and asks for an injunction to restrain defendants from cutting and removing timber from the land, without seeking in this suit to be restored to the possession, the object of the suit being to preserve the property during the pendency of that action: held, that injunction lies, although no action at law has been brought to try the title; that jurisdiction of equity in such cases to grant, first, a temporary, and subsequently a perpetual injunction, does not depend upon the question whether or not such action at law has been brought; that the rule under the English chancery system was the same, and that our statute is not more restrictive. *Hicks* v. *Michael*, 15 Cal. 115.

68. Where the title of plaintiff is disputed in the answer, the usual practice has been to ask the assistance of equity in aid of an action at law; but there are many cases in which the powers of a court of equity have been invoked in the first instance. And equity generally directs an issue at law as to the title, and awaits the action of the court of law upon the issue. *Ib.* 116.

69. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, or when the subject matter of the complaint is free from controversy, or irreparable mischief

will be produced by its continuance. But in all cases where the right is doubtful, the court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief. *Ib.*

70. In cases of waste, if anything is about to be abstracted from the land which cannot be restored in specie, it is no objection to the injunction that the party making it may possibly recover what others may deem an equivalent in money. *Ib.*

71. On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title. *Ib.*

72. Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes; that such quantity was necessary for their use, and that defendants had diverted the same, to their damage, etc. Plaintiffs had verdict and judgment for $21,000 damages: held, that the averments are insufficient to entitle plaintiffs to an injunction; the scope of the bill being simply to enforce in equity plaintiffs' alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. *McDonald* v. *Bear River and Auburn Water and Mining Co.*, 15 Cal. 148.

73. Held, further, that plaintiffs should be permitted, if they desire, so to amend their complaint as to present for determination their legal rights, otherwise the complaint should be dismissed. *Ib.*

74. Bill for an injunction to restrain defendants from taking possession of certain real estate—a warehouse and wharf. Complaint avers plaintiffs' title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed: held, that these allegations are insufficient to authorize an injunction—there being no averment of the insolvency of defendants, and the complaint not showing that there is no adequate remedy at law, and that in such case, forcible entry and detainer would be a speedy mode of regaining possession, if taken by defendants, and for other damages the usual proceedings at law would suffice. That the premises are used in connection with the transportation business, which would be interrupted by the threatened trespass, is not alone a ground for equitable interference. *Tomlinson* v. *Rubio*, 16 Cal. 206.

75. Against the cutting of timber the owner of real property is entitled to the preventive remedy of injunction. Whilst the timber is growing, it is part of the realty, and its destruction constitutes the kind of waste the commission of which a court of equity will, upon petition, restrain. When once cut, the character of the property is changed; it has ceased to be a part of the realty and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it in whosesoever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot find the property to enforce its specific return, he may waive the wrong committed in its removal and use, and sue for the value as upon an implied contract of sale. *Halleck* v. *Mixer*, 16 Cal. 578.

TRIAL.

1. The finding of the court upon ques-

tions of fact will be regarded as the verdict of the jury, and subject to the same review in the appellate court. *Vogan* v. *Barrier*, 1 Cal. 187.

2. Where the case is tried by the court without a jury, the appellate court will not inquire into the sufficiency of the evidence, but will presume the issues of fact properly found. *O'Connor* v. *Stark*, 2 Cal. 155.

3. Upon the trial of an issue of fact by the court, the code requires its decision to be given in writing and filed with the clerk within ten days after the trial takes place. This is not merely directory, and the intention is that the decision shall correspond to the verdict of a jury, and without such a finding the judgment cannot stand. *Russell* v. *Armador*, 2 Cal. 305; *Semple* v. *Berkey*, 2 Cal. 231; *Bowers* v. *Johns*, 2 Cal. 419; *Hoagland* v. *Clary*, 2 Cal. 475.

4. When a case has been once taken to an appellate court, and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot, on a second appeal, be altered or changed. *Dewey* v. *Gray*, 2 Cal. 377; *Clary* v. *Hoagland*, 6 Cal. 687; *Gunter* v. *Laffan*, 7 Cal. 592; *California Steam Nav. Co.* v. *Wright*, 8 Cal. 592; *Cahoon* v. *Levy*, 10 Cal. 216; *Davidson* v. *Dallas*, 15 Cal. 82.

5. The plaintiff always, in contemplation of law, has the affirmative, with the right to open and conclude the cause. *Benham* v. *Rowe*, 2 Cal. 408.

6. A jury was waived by the parties and the cause submitted to the court, the trial made some progress, when on motion of plaintiffs' attorney the case was referred "to ascertain the damages sustained by plaintiff:" held, that the case having been submitted to the court, it was the duty of the court to find upon the facts adduced by the parties, and not the facts presented in a referee's report. *Geeseka* v. *Brannan*, 2 Cal. 519.

7. It is not the province of the court in its finding, where a jury tries the case, to pronounce upon the facts. *Bessie* v. *Earle*, 4 Cal. 200.

8. The verdict of a jury must precede a judgment, but this is not necessary when the court sits as a jury; the finding of a court may be filed after the judgment is rendered; the time or relative order required for the filing is merely directory. *Vermuele* v. *Shaw*, 4 Cal. 216.

9. The power of opening up a case after it has been once submitted rests in the sound discretion of the court hearing the case, and as a general rule will not be revised. *Pinkham* v. *McFarland*, 5 Cal. 138.

10. The statute which requires that upon the trial of an issue of fact by the court, the decision shall state separately the facts and conclusions of law, does not apply in chancery cases. *Walker* v. *Sedgwick*, 5 Cal. 192.

11. The establishment and enforcement of rules limiting the argument of counsel to a certain time, are matters resting in the sound discretion of the court, and unless it appears that injustice has thereby been done, form no ground of appeal. *People* v. *Tock Chew*, 6 Cal. 636.

12. Where counsel in a cause pending in the supreme court stipulate to submit the case to the court on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go beind such stipulation and insist upon points other than those mentioned in the stipulation. *Cahoon* v. *Levy*, 10 Cal. 216.

13. It would seem that a party cannot try his cause before a judge without objection, and after losing it, complain that the case was not tried by a jury. *Smith* v. *Brannan*, 13 Cal. 115.

14. The right to a trial of particular cases in particular counties is a mere privilege which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place. *Watts* v. *White*, 13 Cal. 324; overruling *Vallejo* v. *Randall*, 5 Cal. 462.

15. Courts have a large discretion over the conduct of proceedings before them, and may limit counsel to a reasonable time. But in capital cases this should be done, if at all, only in very extraordinary and peculiar instances. *People* v. *Keenan*, 13 Cal. 584.

16. The trial on the main charge in an indictment will not be postponed because of an appeal on the issue of insanity. *People* v. *Moice*, 15 Cal. 331.

17. It is irregular for one of the justices composing the court of sessions, on a criminal trial, to retire before the termination of the trial, and another justice, not pres-

ent during the previous stages of it, to come in and participate in the proceedings. The members of the court who act as such when the case is developed should continue to act until the close. Whether such irregularity is sufficient to reverse a conviction otherwise regular, not here decided—but the practice is dangerous and disapproved of. *People* v. *Eckert*, 16 Cal. 113.

See VENUE.

TROVER.

1. *An auctioneer who receives and sells stolen property innocently, and in the ordinary course of his business, is liable to the true owner for the conversion thereof. Rogers* v. *Huie*, 1 Cal. 435; overruled in *Rogers* v. *Huie*, 2 Cal. 572.

2. Conversion is the gist of the action of trover, and without conversion neither possession of the property, negligence, or misfortune, will enable the action to be maintained. *Rogers* v. *Huie*, 2 Cal. 572.

3. To render a defendant liable for trover, he must have converted the property to his own use; and if not, then any other act to amount to a conversion must be done with a wrongful intent, either expressed or implied. *Ib.* 573.

4. An action in trover may be maintained against a trespasser who is cutting timber, as soon as the timber is cut. *Sampson* v. *Hammond*, 4 Cal. 184.

5. If the parties were tenants in common, and the defendant sold the chattels held in common, and appropriated the proceeds to his own use, the remedy of the plaintiff is in trover, or by an action for money had and received; and, an action for goods, wares and merchandise, sold and delivered, will not entitle him to a judgment. *Williams* v. *Chadbourne*, 6 Cal. 561.

6. All the parties in interest should join in an action of trover, and a failure to join may be pleaded in abatement. *Whitney* v. *Stark*, 8 Cal. 516.

7. Where M. made a bill of sale to G., of forty-two barrels of vinegar, then in possession of G., as keeper of the sheriff, as collateral security for a debt due G., and G. subsequently gave back the bill of sale to M., without any liquidation of the debt, or change of the possession of the property, and the property was afterwards sold by the defendant as sheriff, M. bringing an action of trover against the defendant, to recover the same: held, that M. had no title to the property upon which he could recover in such an action, as the mere handing back the bill of sale of M. did not revert the title in him. *Middlesworth* v. *Sedgwick*, 10 Cal. 393.

8. In trover, the plaintiffs must either have the possession, or the immediate right to the possession of the property, to entitle them to recover. *Ib.*

9. Plaintiff brought an action of replevin against the defendants to recover certain property, and obtained a judgment for its restitution, and damages for its illegal detention; defendants paid the damages, but the property was not restored, Plaintiffs then brought an action of trover to recover the value; defendants plead the former recovery as a bar: held, that the judgment in replevin did not constitute a bar to the action of trover, the judgment in replevin not being satisfied. *Nickerson* v. *California Stage Co.*, 10 Cal. 521.

10. Where the defendant contracted with a factor, who was in his debt for certain goods, but before he took them away, was informed that a portion of them belonged to another, his taking such portion was an unlawful assumption of ownership, and a conversion of the property. *Scribner* v. *Marsten*, 11 Cal. 306.

TRUST AND TRUSTEE.

1. The law which deprives a married woman of the right to make contracts, is not altered by the statute, unless in respect of the property specified by it, and she cannot bring suit, in her own name, upon a contract which she is not authorized by statute to make. *Snyder* v. *Webb*, 3 Cal. 88.

2. Where land is purchased in the name of one person, and the consideration is paid by another, a trust immediately arises,

and the person in whose name the conveyance is taken is deemed in law to hold as trustee for the one furnishing the money. *Osborne* v. *Endicott*, 6 Cal. 153.

3. In order to create such a trust, the facts need not appear affirmatively, on the face of the deed, but may be proved by any note or memorandum, in writing, of the nominal purchaser, even though he plead the statute of frauds. *Ib.* 154.

4. A trustee cannot purchase, nor deal with the subject of the trust, nor purchase debts to be paid out of the trust fund, nor place himself in a position antagonistic to the trust. *Page* v. *Naglee*, 6 Cal. 245.

5. The purchase by a trustee of a debt, to be paid out of the trust fund, and causing an action to be brought, and a judgment obtained thereon, in the name of another, if not a fraud in fact, was a violation of his duties as a trustee, and it makes no difference, in this respect, whether his trust is created by deed or mortgage, or whether the same was void or not. *Ib.*

6. Having accepted the trust and received the rents of the property, the trustee cannot dispute its validity, particularly for his own benefit. *Ib.*

7. A judgment so obtained by a trustee is void in law, and a nullity, and may be enjoined at the instance of the party executing the deed of trust to secure the payment of his debts out of the fund. *Ib.*

8. The transfer of a bond for title to land upon a promise, by the assignee, to pay a certain debt of the assignor, binds the assignee to perform the trust, and the obligation to pay his debt is not affected by any misrepresentations made by the assignor to the assignee, because the rights of the creditor, under the transfer, had already vested. *Connelly* v. *Peck*, 6 Cal. 353.

9. And where the assignee was a commercial firm, and the assignment was made to an agent, acting as the trustee of the firm, and the agent obtained from the obligor in the bond a deed for the land to the members of the firm; and, subsequently, the firm sold the land to their successors in business, constituting a new firm, of which some of the old firm were members: held, that the purchasers are chargeable with notice of the trust. *Ib.*

10. On the trial of an issue of fact, involving the validity of a will, a subscribing witness thereto is not rendered incompetent as a witness by holding land devised therein in trust for the devisee, and without having any interest himself therein. *Peralta* v. *Castro*, 6 Cal. 357.

11. And where such trustee had executed a covenant of warranty to a purchaser of a portion of such lands, but was fully indemnified against loss thereby, by the cestui que trust, and also held, what he thought, a sufficient portion of the purchase money so received as further indemnity, he is a competent witness. *Ib.*

12. Where the deed to the trustee, and his covenant of warranty, were given in evidence to support the objection to his competency, by which it appeared that the land was conveyed to him absolutely, and that he had conveyed a part, with covenant of warranty, but it appeared from his examination, on his voir dire, that his trust existed by parol, and that he really had no interest therein, and was indemnified against loss by the warranty: held, that the question as to the admissibility of such parol evidence to contradict or vary the terms of the instrument under seal could only properly arise in a suit between the trustee and the cestui que trust, upon a denial of the trust by the grantee, and that, for the purpose of the examination, the evidence on the voir dire is admissible. *Ib.*

13. Where a bill alleges a parol trust, it seems that it must be denied, and a general demurrer will not lie. *Ib.*

14. Where the complaint charged that A was indebted to plaintiff, and had conveyed his property to B to be disposed of for his benefit, and had drawn an order in favor of plaintiff on B, who had accepted it; and further charged that B had subsequently reconveyed a portion of the property to A, without consideration, praying that B be compelled to execute the trust in favor of plaintiff: held, that A was a necessary and proper party to the action. *Lucas* v. *Payne*, 7 Cal. 96.

15. By the acceptance of the order they became liable to the plaintiffs as trustees, which liability they could not escape by a subsequent fraudulent transfer of the trust property. *Ib.*

16. Where an administrator is sued in equity by the people, to compel him to pay over to the county treasurer money collected by the intestate as the collector: held, that he occupied the position of one

who takes possession without authority of property belonging to another, and that he may be treated as a trustee de son tort. *People* v. *Houghtaling*, 7 Cal. 351.

17. If the plaintiff alleges an express trust, it is incumbent upon him to prove it as alleged, but such a trust may be proved by circumstances, and to ascertain the intention of the parties, the court will consider the then existing circumstances. *Gunter* v. *Janes*, 9 Cal. 655.

18. A mortgagee, who is also a trustee, is as strictly bound to execute his trust faithfully as he would be were he not a creditor, but acting for the benefit of another cestui que trust. *Ib.*

19. A party seeking to enforce a trust against the administrator of a trustee, is compelled, from the complex nature of the cause, to ask relief in a court of equity. The claimant of specific property is not a creditor within the meaning of the probate law, and therefore he is not bound to present his claim to the administrator. *Ib.*

20. A trustee cannot, by mingling trust moneys with other funds, change his character from that of trustee to that of mere debtor. *Ib.* 659.

21. The acts of either the trustee or cestui que trust, without the consent of the other, should not be permitted to change the relation or capacity of the parties. *Ib.*

22. In cases of express trust, the capacity and that of the cestui que trust are created by trust, and all the legal rights and duties belonging to the one or the other are but the legitimate results contemplated by the contract itself, and flow from the capacity of each party thus created by the concurrence of the two wills. *Ib.*

23. If the trustee does a wrongful act, then he by the act consents to be treated as a trespasser or debtor, at the option of the cestui que trust. *Ib.*

24. A trustee should never be permitted to defeat the rights of the cestui que trust so long as it is in the power of a court of equity to enforce them. *Ib.* 660.

25. When trustees act with good faith, and without any selfish motive, they are entitled to be treated by a court of equity with liberality and indulgence, and especially when they act under the advice of counsel. *Ellig* v. *Naglee*, 9 Cal. 695.

26. Trustees act for the benefit of others and not for themselves, and the fair exercise of their judgments should be a protection to them. Very supine negligence or willful default will render them liable; but to make them liable for mere errors of judgment would tend to discourage good and prudent men from undertaking any trust. *Ib.*

27. Delay on their part in bringing suit to recover the rents of the trust estate, if subsequently approved by the cestui que trusts, will excuse them. *Ib.* 696.

28. Money advanced by the trustees to the cestui que trusts, with the understanding that the same should be repaid out of the rents of the trust property, is a lien only upon the net incoming rents, and not a lien upon the trust property. *Ib.*

29. The same is true respecting the charges for legal services of one of the trustees in the management of the trust property. The rents must be applied to the payment of such allowances until they are liquidated. *Ib.*.

30. The condition that the party of the second part shall deliver up the property upon a failure to comply with its terms, to the party of the first part, to be sold by them to pay the debts of the firm outstanding, then to pay the balance over to the party of the second part, is only a trust retained upon the property sold which may be enforced like any other trust. A court of equity would enforce it as a mortgage or vendor's lien. *Cayton* v. *Walker*, 10 Cal. 454.

31. Where a party signs a promissory note with the addition to his name of the word "trustee," he is personally liable; nor can evidence be admitted to show that at the time of the execution of the note there was a parol agreement that he should not be personally liable, but the note was to be paid out of a trust fund. *Conner* v. *Clark*, 12 Cal. 171.

32. A deed by a husband of his separate real estate to a trustee for the benefit of his wife, whether executed in compliance with an antenuptial contract, or by way of settlement upon his wife, independent of any previous contract, the husband being at the time free from debts and liabilities is valid. *Barker* v. *Koneman*, 13 Cal. 10.

33. The law allows, and even regards with favor, provisions made by the husband, when in solvent circumstances, for his wife and family, against the possible

misfortunes of a future day, by setting apart a portion of his property for their benefit. *Ib.*

34. A note, stating that "We, the undersigned, trustees of the First African Methodist Episcopal Church, on behalf of the whole board of trustees of said association, promise to pay," etc., and signed without qualification by two persons having authority, is the note of the church, and not of the signers. *Haskell* v. *Cornish*, 13 Cal. 47.

35. A mortgagee of land in possession must account for rents and profits; and after payment of the debt for which the mortgage was given, he becomes by operation of law, trustee of the surplus for the mortgagor. *Pierce* v. *Robinson*, 13 Cal. 121.

36. Where it was agreed between the mortgagor and mortgagee that the land and its proceeds were to be held not only as security for the debt due the latter, but for debts due third persons, laborers on the land for instance: held, that such an agreement was an appropriation of said surplus for the benefit of said third persons, not revocable when they have acted on the faith of it, and the mortgagee is a trustee of the same for said third persons. *Ib.*

37. Such an agreement operates as an equitable assignment of the surplus, so soon as any exists which does not pass to the administrator of the mortgagee as general assets for the benefit of the creditors at large, but is subject in his hands to the same trust which attached to it before the decease of the intestate. *Ib.*

38. If a confidential agent, trusted by a principal with money used in trade, appropriates the money to the purchase of property for his own use and benefit, and the property can be identified as that so bought, the agent will be held as trustee for the owner of the money. *Wells* v. *Robinson*, 13 Cal. 139.

39. After the assignee of property in trust for creditors takes possession, the title and trust become fixed and executed, and the assignment is not recoverable. The want of a schedule of the property in such case, though sometimes regarded as a circumstance of fraud, will not of itself avoid the assignment. *Forbes* v. *Scannell*, 13 Cal. 287.

40. That the trustees employ the partner assigning to aid them in winding up the concern, and pay him, and allow his wife some furniture, etc., is not proof of fraud in the assignment, there being no evidence that these benefits were promised at the time of the assignment. *Ib.* 288.

41. Where the wife makes a contract with the husband by which she gives him money, her separate property, for steamboat stocks owned by him: held, that assuming the contract to be void because made between husband and wife, the husband is in a position of having taken his wife's money without her consent and converted it into stock, and that he thereby becomes her trustee; that she can follow the money into whatever property it goes; that being in possession of the stock she can hold it until fully indemnified, and that his creditors cannot reach it. *George* v. *Ransom*, 14 Cal. 660.

42. A deed of trust, the trustee not being the creditor, but a third party, given to secure a note, and authorizing the trustee to sell the land at public auction and execute to the purchaser a good and sufficient deed of the same, upon default in paying the note, or interest as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, is not a mortgage, requiring judicial foreclosure and sale. *Koch* v. *Briggs*, 14 Cal. 262.

43. In a deed of trust, as here, there can be no forfeiture of the estate, and hence, no equity, as against such forfeiture to foreclose, as in England. Nor should a suit for decree and sale, as under our system, lie, because such suit could be based only on the contract of the parties, and the contract is that the trustee shall sell, upon the happening of a certain event. *Ib.* 463.

44. Relief in equity would be limited to the contract, and a sale could only be made by enforcing the trust. From sales under such trusts there is no equity of redemption, for there is no forfeiture. Performance of the trust carries out the contract of the parties. *Ib.*

45. A party who permits himself to stand on the book of a water company, incorporated under the statutes of the State, as a stockholder, is eligible to office, and is not a competent witness for the company in an action against it for overflowing plaintiff's mining claim. The fact that the stock

was held in his name in trust for another, the transfer having been made simply to enable him to become an officer of the company, does not relieve him from responsibility. The trust, in such case, is only implied; and the seventieth section of the corporation act of 1853 applies only to the trustee of an express trust. *Wolf* v. *St. Louis Independent Water Co.*, 15 Cal. 320.

46. Defendants were the holders of a mortgage executed by the Yreka Water Co. and B. to them, to secure advances made and to be made, by themselves and others, to said company. Plaintiff had made advances to the company, and was one of the persons intended to be secured by the mortgage, though not a party thereto. Defendants assign the mortgage, receive the consideration therefor, but refuse to pay any portion of the money to plaintiff, who sues for money had and received to his use; held, that defendants occupied toward plaintiff the position of trustees, and that the money sued for was received in that character; that it is of no consequence that the trust was created by a contract to which plaintiff was not a party, as he subsequently assented to it, and defendants cannot now repudiate it and detain money which they would not otherwise have received. *Kreutz* v. *Livingston*, 15 Cal. 347.

47. Bill avers, in substance, plaintiff to be holder of several notes and mortgages executed to him by defendants, H. and wife, and that the defendant, O'D., proposed to plaintiff to buy said notes and mortgages for a certain sum, which plaintiff agreed to take; that O'D. desired, before closing the purchase, to see H. and wife, and learn whether they could be induced or compelled to pay the notes; asked plaintiff for the notes and mortgages to show H. and wife, and that plaintiff delivered them to him, relying on his honesty; that O'D. saw H. and wife, who were illiterate, and by representing himself as the owner of the notes, etc., which he exhibited, by threatening to sue, etc., induced H. and wife to give him an absolute deed in fee simple of the mortgaged premises for one hundred dollars, the premises being worth many more thousands of dollars; that O'D. then returned the notes, etc., declined purchasing of plaintiff, and concealed the fact of having a deed, acted as agent and trustee of plaintiff, and for his benefit, and should have taken the deed in his name; that in equity said O'D. ought to be declared such trustee, and execute a deed of the property to plaintiff; that, on account of a defect in the record of one of the mortgages, it does not impart notice, etc., and that if O'D. should sell the property, as he is trying to do, to an innocent purchaser, such sale would injure plaintiff irreparably. Other parties are made defendants, as claiming some interest subsequent to plaintiff. Complaint prays for injunction against O'D., that said trust be declared, that he execute a deed to plaintiff, that H.'s wife execute to plaintiff such further conveyance and assurance and release of equity of redemption as may be just in satisfaction of said mortgages, and that all defendants be barred, foreclosed, etc.; or that the deed by H. and wife to O'D. be declared void and canceled, and he be foreclosed of all equity of redemption thereunder; and if such deed be canceled, that then the plaintiff have judgment against H. and wife on said notes, that all the defendants be barred, etc., and premises sold to pay the judgment, etc. O'D. demurs that inconsistent causes of action are united: held, that the demurrer is not well taken, that the allegations of the complaint make out a homogeneous case as against all the defendants, to wit: a right to enforce the mortgages, and to a decree of foreclosure binding subsequent claimants, of whom O'D., by his purchase, is one, with notice of the mortgages. *De Leon* v. *Higuera*, 15 Cal. 495.

48. Where plaintiff deposits money with defendant, to be loaned out from time to time, the interest to be collected, and principal and interest to be held by him for plaintiff until called for, there is a continuous trust, and if defendant used the money himself, he would be like a guardian using his ward's money, and be regarded as a borrower upon the same terms upon which he could have loaned to others. *Baker* v. *Joseph*, 16 Cal. 176.

49. Where a son conveys real estate to his father—the only consideration being a verbal agreement by the father to make a will and devise to the son certain property, and the father dies without having complied with the agreement—the agreement is void, the conveyance is executed without consideration, express or implied, and

a trust results in favor of plaintiff by implication of law, and he may set aside the conveyance and recover the property—it being shown that the transaction was not a gift. *Russ* v. *Mebius*, 16 Cal. 355.

50. If, in such case, the conveyance did not express the consideration for which it was given, but acknowledged the payment of a nominal consideration in money, parol evidence would be inadmissible to establish trust in favor of the son. *Ib.* 356.

51. The doctrine of resulting uses and trusts is founded upon mere implication of law, and, generally, this implication cannot be indulged in favor of the grantor, where it is inconsistent with the presumptions arising from the deed. Unless there be evidence of fraud or mistake, the recitals in a deed are conclusive upon the grantee, and no resulting trust can be raised in his favor in opposition to the express terms of the conveyance. *Ib.*

52. No implication of trust arises on the purchase of property by a parent in the name of his child; as is the case when the purchase money is paid by one person, and the conveyance taken in the name of a stranger. Prima facie, such purchase is regarded as an advancement. *Ib.* 357.

UNDERTAKING.

I. In general.

1. An undertaking exacted by an officer when he has no authority to require it, is void. *Benedict* v. *Bray*, 2 Cal. 255.

2. An undertaking which is void at law is not legal evidence. *Ib.*

3. No alteration or erasure will defeat the recovery upon a bond, unless it materially affects the rights or condition of the obligee, or is the result of a fraudulent intent to effect the same object. *Turner* v. *Billagram*, 2 Cal. 522.

4. If an undertaking has to be executed by the plaintiff, and is executed to the defendant by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the party intended. *Morgan* v. *Thrift*, 2 Cal. 563.

5. An omission to allege delivery in a suit on a bond can be taken advantage of only on demurrer, or the defect is cured by a verdict. *Garcia* v. *Satrustegui*, 4 Cal. 244.

6. In an action on a bond or written undertaking there can be no constructive parties jointly liable with the proper obligors. *Lindsay* v. *Flint*, 4 Cal. 88.

7. A plaintiff being the real party in interest has a right to sue upon an undertaking, though made payable to the people of the State. *Taaffe* v. *Rosenthal*, 7 Cal. 518; *Baker* v. *Bartol*, 7 Cal. 554.

8. To support the condition of a bond, the court will transpose or reject insensible words, and construe it according to the obvious intent of the parties. *Swain* v. *Graves*, 8 Cal. 551.

9. But conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it cannot be set up by the obligors, as the bond would be single, and in a suit thereon the plaintiff would be entitled to the full amount. *Ib.*

10. The sureties on an undertaking are entitled to stand on the precise terms of the contract, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves. *Tarpey* v. *Shillenberger*, 10 Cal. 390.

11. When a party gave notice of the justification of the sureties on an undertaking before the clerk of the court below on the second of November, between the hours of ten A. M. and five P. M., of that day, and the sureties appeared upon such notice soon after ten of that day: held, that the clerk acted properly in refusing to take their justification, the opposite party being absent until the last hour stated in the notice. *Lower* v. *Knox*, 10 Cal. 481.

12. Where there are several obligees in

such an undertaking promising to pay "said parties enjoined," etc., suit may be brought in the name of one alone, if he be beneficially entitled to the fruits of the recovery. *Prader* v. *Purkett*, 13 Cal. 591.

13. Where a surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety. *Pico* v. *Webster*, 14 Cal. 204.

14. No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only; otherwise as to the undertaking under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal. *City of Sacramento* v. *Dunlap*, 14 Cal. 423.

II. On Attachment.

15. Damages caused by the depreciation of real estate under an attachment, and injury caused to the credit and reputation of the defendants by reason of the attachment, are too remote to submit to the jury in an action on the undertaking. *Heath* v. *Lent*, 1 Cal. 412.

16. *In an action on an attachment bond for damages accruing from a wrongful suing out of an attachment, counsel fees constitute no part of the damages. Heath* v. *Lent*, 1 Cal. 412; overruled in *Ah Thaie* v. *Quan Wan*, 3 Cal. 219.

17. If the affiant had not good reason to believe the matters set forth in his affidavit on attachment, the defendant, whose name and credit have been impaired by the wrongful issuing out of the writ, has no recourse on the bond, if his property has not been attached, but must resort to a criminal action or a private action for the tort. *Heath* v. *Lent*, 1 Cal. 412.

18. If a justice issue an attachment and take an undertaking in a suit for a sum exceeding his jurisdiction, the proceedings are void, and no action will lie on the bond. *Benedict* v. *Bray*, 2 Cal. 254.

19. An attachment bond was executed, but before the writ was levied the attachment was dismissed: held, that the bond was void. *Ib.*

20. The undertaking should precede the writ and accompany the affidavit. *Ib.*

21. It is no objection to an undertaking on attachment that it is made payable to the people of the State of California instead of the defendant in the suit, as the latter can sue thereon in his own name. *Taaffe* v. *Rosenthal*, 7 Cal. 518.

22. A mistake in the recital of the bond as to the amount for which the attachment issued may be explained and corrected by parol. *Palmer* v. *Vance*, 13 Cal. 556.

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1. *On Release of Attachment.*

23. Where a bond is given for the release of a vessel attached by virtue of a statute which does not apply to vessels of that peculiar class: held, that the principal and sureties were not liable on the bond. *Mc Queen* v. *Ship Russell*, 1 Cal. 165.

24. Where the bond is given the vessel shall be released, leaving the action to proceed in the same manner against the vessel as if it had remained under seizure, and if the vessel is not liable, the giving of the bond cannot vest a jurisdiction over the subject matter. *Ib.* 166.

25. A bond given to release property attached only releases it from the custody of the sheriff, and is not an actual substitution of security, compelling the plaintiff to proceed upon the bond alone to collect his judgment. *Low* v. *Adams*, 6 Cal. 281.

26. In an action on a bond given to release property from attachment, the complaint should state that the property was released upon the execution and delivery of the bond. To charge the obligors, it is necessary to state the consideration of the undertaking, and a mere reference to a condition of the bond itself, wherein such release is stated as a consideration, is insufficient. *Palmer* v. *Melvin*, 6 Cal. 652; *Curtis* v. *Richards*, 9 Cal. 37.

27. In a bond given to release property seized on attachment, the obligors undertook to pay on demand to plaintiffs in the action the amount of the judgment and costs, not to exceed $3,000, which plaintiffs might recover. In the bond the action is recited as for $1,600. Upon delivery of the bond the property was returned to the debtor. Plaintiffs in the action had judgment for an amount exceeding the penalty of the bond: held, that recovery may be had on the bond to the extent of

the penalty. *Palmer* v. *Vance*, 13 Cal. 556.

28. Such a bond is not a statutory undertaking, but is valid as a common law obligation; the mistake in the recital as to the amount for which attachment issued may be explained and corrected by parol. *Ib.*

29. Execution against the judgment debtor in such case is not a condition precedent to suit on the bond. *Ib.* 557.

30. A bond given to the sheriff voluntarily on delivery of the property is valid at common law. *Ib.*

III. On an Indemnity to Sheriff.

31. An indemnity bond to the sheriff to retain property seized under attachment is an instrument necessary to carry the power to sue into effect. *Davidson* v. *Dallas*, 8 Cal. 251.

32. Where property was seized under two attachments, and the property was claimed by a third party, whereupon both attaching creditors indemnified the sheriff, who went on and sold it and paid the proceeds to the first attaching creditor, the amount not equalling his judgment, and afterwards the claimant obtained judgment against the sheriff for the value of the property: held, that the recourse must be had against the first attaching creditor, for whose benefit the property was sold. *Ib.* 253; doubted in the same case, 15 Cal. 80.

33. Where an indemnity bond is given to the sheriff to hold him harmless and pay any judgment which may be rendered against him by reason of his seizure of certain property, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not, and a bill in equity will not lie. *White* v. *Fratt*, 13 Cal. 524.

34. Where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. *Ib.* 525.

IV. On Appeal.

35. On an application for justification of bail on appeal, the merits of the appeal will not be considered. *Bradley* v. *Hall*, 1 Cal. 199.

36. If the appellants have been guilty of no laches in perfecting their appeal, the court may enlarge the time, upon terms, for them to file their bond to entitle them to a stay of proceedings. *Ib.*

37. The omission of the words "to pay to" will not invalidate the obligation of an appeal bond, or leave should be granted to file a good bond. *Billings* v. *Roadhouse*, 5 Cal. 71.

38. An objection that a county court has no jurisdiction in cases on appeal, where no appeal bond is given, as required by the statute, should be made in the court below; it is too late to raise the question in the supreme court. *Howard* v. *Harman*, 5 Cal. 78.

39. Where such an objection is made in the proper time, it is the duty of the presiding judge to hear the excuse of the party failing to produce it, and if sufficient, to allow him to file a bond. *Ib.* 79.

40. Where an appeal is dismissed for want of a proper bond and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law. *Martinez* v. *Gallardo*, 5 Cal. 155.

41. An objection that there is no undertaking on appeal filed cannot apply in a case where no right of the defendant is infringed, and a State cannot be denied a hearing in her own courts because no bond has been filed for costs, when a fund has been provided by law for such cases. *People* v. *Clingan*, 5 Cal. 391.

42. To enable the assignee of a judgment to sue on an appeal bond filed in the cause, he must have an assignment of the bond. *Moses* v. *Thorne*, 6 Cal. 88.

43. Where an appeal is withdrawn or dismissed by consent of both parties, no action can be maintained on the appeal bond. *Osborn* v. *Hendrickson*, 6 Cal. 175.

44. Giving an appeal bond does not release the lien acquired by docketing the judgment. *Low* v. *Adams*, 6 Cal. 281.

45. Where the appeal is bona fide, and not taken for delay, appellate courts will always permit a new undertaking to be

filed where the original is defective. *Coulter* v. *Stark*, 7 Cal. 245.

46. Where a motion is made in the county court to dismiss an appeal, on the ground that the undertaking filed is insufficient, and before the determination thereof the other party offers to amend his undertaking: held, that it is error to refuse to allow him so to do. *Cunningham* v. *Hopkins*, 8 Cal. 33.

47. The appellant must show by the certificate that the notice and undertaking on appeal has been filed in due time, and if not shown to be filed, then the respondent must object thereto by motion to dismiss, and not for the first time in his brief. *Bryan* v. *Berry*, 8 Cal. 134; *Franklin* v. *Reiner*, 8 Cal. 340; *Whipley* v. *Mills*, 9 Cal. 641; *Hastings* v. *Halleck*, 10 Cal. 31.

48. An appeal bond will be so construed as to carry out the obvious intention of the parties. *Swain* v. *Graves*, 8 Cal. 551.

49. An undertaking on appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite. *Curtis* v. *Richards*, 9 Cal. 38; *Tissot* v. *Darling*, 9 Cal. 285.

50. A district court has no jurisdiction of an action on an appeal bond to pay all costs and damages not exceeding three hundred dollars, when the costs and damages amount to less than two hundred dollars. *Page* v. *Ellis*, 9 Cal. 250.

51. An averment in the complaint, in a suit on an appeal bond, that execution had been issued on the judgment and returned unsatisfied, is necessary. The nonpayment of the judgment can be shown without issuing an execution. *Tissot* v. *Darling*, 9 Cal. 285.

52. Where suit is brought in the name of the husband and wife, and no objection is made to the joinder of the wife, and judgment is obtained, and afterwards defendants execute an undertaking on appeal to the husband and wife, and suit is afterwards brought on the undertaking in the name of the husband and wife: held, that the defendants are concluded by the acts of the appellant, and that the wife is properly joined in the suit on the undertaking. *Ib.*

53. It is the duty of a justice of the peace, when an appeal bond is presented to him for his approval, to act promptly. If he receives the bond without objection, it will be too late to disapprove it the next day. *People* v. *Harris*, 9 Cal. 572.

54. The service of notice should be made after, or at the time of filing of the notice of appeal, and before or at the time of the filing the undertaking on appeal. *Hastings* v. *Halleck*, 10 Cal. 31.

55. The period of five days fixed by law for filing the undertaking on appeal cannot be abridged by the error or negligence of the appellant; nor can that appellant, by serving a copy of the notice of appeal before the original is filed, keep the respondent watching the clerk's office to see when it is done. *Ib.*

56. Where a notice of appeal to the supreme court and undertaking were filed in the clerk's office on the sixteenth of December, and on the next day a copy of the notice was served on the respondent, who within five days after filing the undertaking excepted to the sufficiency of the sureties to the undertaking: held, that the respondent was not injured by the failure of the appellant to serve a copy of the notice of appeal on the day the undertaking was filed. *Mokelumne Hill C. and M. Co.* v. *Woodbury*, 10 Cal. 187.

57. Where the sureties to an undertaking on appeal justify in a sum less than double the amount specified in the undertaking, but more than double the amount of $300, such undertaking is sufficient, under section three hundred and forty-eight of the code, though insufficient to stay the issuance of the execution. *Ib.*

58. Where the appellant, on an appeal pending from the district court to the supreme court, filed in the clerk's office of the distrtct court his notice of appeal and undertaking, and the respondent within the time allowed by law excepted to the sufficiency of the sureties to the undertaking, and they failed to justify to the satisfaction of the clerk of said court, who issued execution on said judgment: held, that it was error in the judge of said court to make an order of supersedeas staying said execution. *Ib.* 188.

59. No undertaking on appeal is necessary when the appeal is taken by the county. The board of supervisors represent the county in legal proceedings. *People* v. *Svpervisors of Marin County*, 10 Cal. 346.

60. The failure of sureties on appeal to justify where they are excepted to, leaves

the appeal as though no undertaking had been filed, and ineffectual for any purpose. *Lower* v. *Knox*, 10 Cal. 480.

61. Where a party gave notice of the justification of the sureties on an undertaking before the clerk of the court below, on the second of November, between the hours of ten A. M. and five P. M. of that day, and the sureties appeared upon such notice, soon after ten of that day: held, that the clerk acted properly in refusing to take their justification, the opposite party being absent, until the last hour stated in the notice. *Ib.* 481.

62. Where, in an action on an appeal bond, conditioned to pay the judgment appealed from if the same should be affirmed by the appellate court, it appeared that the judgment appealed from was reversed, with directions to enter a different judgment: held, that the conditions of such bond were not broken, and that no action would lie thereon. *Chase* v. *Ries*, 10 Cal. 517.

63. In an undertaking on appeal, the names of the sureties need not appear in the body of the paper. *Dore* v. *Covey*, 13 Cal. 507.

64. The stay of proceedings accorded by the statute to the executiou of the undertaking on appeal is a sufficient consideration. *Ib.* 508.

65. Noncompliance with the directory provisions of the statute intended for the benefit of the respondent does not vitiate the undertaking. *Ib.*

66. Residence of the sureties and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions. *Ib.* 509.

67. The execution of the paper, the delivery of it to the clerk, filing it among the papers, with the affidavit, and the actual suspension of proceedings, is prima facie as sufficient proof of delivery, if delivery is essential, as if the instrument were sealed. *Ib.* 510.

68. Where an undertaking on appeal is more favorable to the appellee than the statute requires, he cannot complain that the statute has not been followed. *Ib.* 510.

69. Where an instrument, purporting to be a bond on appeal, contains words of obligation, and has a scroll opposite the name of one of the two signers, who cotemporaneously verify the instrument as their bond, it is the bond of both. *Canfield* v. *Bates*, 13 Cal. 608.

70. On appeal from a justice's court, in forcible entry and detainer, the execution of an appeal bond, within ten days, is not a condition to the jurisdiction of the county court. *Rabe* v. *Hamilton*, 15 Cal. 32.

71. If the bond be void or defective, through accident or mistake, a new bond may be filed on such terms as the court deems just, the right to the other party being regarded. *Ib.* 33.

72. Dismissal of an appeal in the supreme court for want of prosecution, in accordance with the rules of the court, operates as an affirmance of the judgment below within the statute relative to undertakings on appeal, unless the order of dismissal be vacated during the term. *Karth* v. *Light*, 15 Cal. 326; *Chamberlin* v. *Reed*, 16 Cal. 207.

73. By the code, the undertaking on appeal, providing for the liabilities of the sureties upon condition of the affirmance of the judgment, operates as a stay, and if by a mere neglect to prosecute the appeal, and for that reason suffering it to be dismissed, after the respondent has been deprived of his rights under the judgment by the undertaking, the sureties could be released, upon the pretense that the judgment was not affirmed, it is evident that great injustice would be in many instances perpetrated, and a fraud practised upon respondents. *Karth* v. *Light*, 15 Cal. 327; *Chamberlin* v. *Reed*, 16 Cal. 207.

74. After notice of exception to the sufficiency of the sureties on an undertaking on appeal to the supreme court, they cannot justify without notice to the adverse party; and in this case, the justification being made without notice, the appeal was ordered to be dismissed, unless appellants, within ten days, file a new undertaking, and the sureties thereon justify upon notice to the respondent. *Stark* v. *Barrett*, 15 Cal. 364.

75. An appeal will not be dismissed on the ground of insufficiency in the justification of the sureties on the undertaking, where the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. *Dobbins* v. *Dollarhide*, 15 Cal. 375.

76. Where the examination of the

sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render the appeal effectual, respondent's remedy is by motion in the court below for leave to proceed on the judgment, notwithstanding the uudertaking, and not by motion in the supreme court to dismiss the appeal. *Ib.*

77. The undertaking on appeal to the supreme court must, in all cases, be filed within five days after filing notice of appeal, and the court has no power to extend the time. *Elliott* v. *Chapman*, 15 Cal. 384.

78. Construing sections three hundred and forty-eight and three hundred and thirty-seven of the code together, they provide that an appeal is not effectual for any purpose, unless an undertaking be filed, or a deposit made with the clerk within five days after filing the notice, and failure to so file the undertaking or make the deposit will be fatal to the appeal, and it must be dismissed. *I b.*

79. Where an appeal is taken by a party, and as a condition to give it effect, a bond or undertaking, with or by sureties, is annexed—the undertaking being executed for the benefit of appellant—the law presumes it was executed at his request, and probably no proof of that fact is requisite in a suit by the surety against the appellant, for money paid on account of the suretyship. At all events, very slight proof of such request would be required. *Bostic* v. *Love*, 16 Cal. 72.

80. If an undertaking on appeal to the supreme court be sufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing; and this, where the undertaking was excepted to, there being no effort to enforce the judgment pending the appeal. *Chapin* v. *Broder*, 16 Cal. 420.

See UNDERTAKING.

V. On Injunction.

81. An order for an injunction must be deemed inoperative until an undertaking be given, otherwise the party enjoined would have no security for any damages which he might sustain by reason of the injunction. *Elliott* v. *Osborne*, 1 Cal. 397.

82. In an action upon an injunction bond to recover damages for the wrongful issuing out of an injunction, counsel fee to procure a dissolution of the injunction was properly allowed as part of the damages. *Ah Thaie* v. *Quan Wan*, 3 Cal. 217; *Summers* v. *Farish*, 10 Cal. 353; *Heyman* v. *Landers*, 12 Cal. 111: *Prader* v. *Grim*, 13 Cal. 587: overruling *Heath* v. *Lent*, 1 Cal. 412.

83. Where an injunction is dissolved, and the suit in which it issued is dismissed by the party obtaining it, that is no admission that the injunction was improperly sued out. In such case, to maintain an action on the bond, it must be shown that there was no proper cause for the injunction. *Gelston* v. *Whitesides*, 3 Cal. 311.

84. In an action for an injunction bond the judgment of dissolution is conclusive, and the only question is the amount of damage sustained. *I b.*

85. In an action on an undertaking for an injunction, the sureties cannot plead that the business which was enjoined was a public nuisance. *Cunningham* v. *Breed*, 4 Cal. 385.

86. An injunction to prevent a defendant from felling trees will not be dissolved where a question of boundary is involved, especially as plaintiff's bond will fully protect the defendants for any delay if it should turn out that he has the right. *Buckelew* v. *Estill*, 5 Cal. 108.

87. An injunction bond, though given to all the obligees by name, and using no words decidedly expressing a several obligation, yet necessarily creates a several liability. *Summers* v. *Farish*, 10 Cal. 351.

88. In an action against the sureties on an injunction bond, the condition of which is that the plaintiff in the suit for whom the sureties undertake should pay all damages and rents that should be awarded against the plaintiffs by virtue of the issuing of said injunction by any competent court, and the complaint did not aver that any damages had been awarded: held, that such complaint is fatally defective. *Tarpey* v. *Shillenberger*, 10 Cal. 390.

89. In a suit on an injunction bond, defendant, to show that the injunction suit was still pending, offered in evidence an order from the supreme court directing the

court below to fix the amount of a suspensive appeal bond, that court having dissolved the injunction: held, that the order was properly rejected, the defendant not offering to show that the bond and notice of appeal were given, and the transcript filed in the appellate court. *Woodbury* v. *Bowman*, 13 Cal. 635.

90. The usual bond being given, an order was made to show cause why an injunction should not issue; a restraining order "in the meantime" was issued. The case was continued a while, and on hearing the order, was dissolved, injunction denied and suit dismissed. Suit was brought on the bond, and it was held, that the restraining order embraces the time between its issuance and the hearing, and that damages may be had beyond the continuance, and that counsel fees may also be recovered. *Prader* v. *Grim*, 13 Cal. 587.

91. An undertaking on injunction, reciting that it is made in pursuance of the order of court requiring a bond in the suit in which a restraining order was already in force, sufficiently expresses a consideration. The order for the bond and the undertaking must be taken together. *Prader* v. *Purkett*, 13 Cal. 590.

92. On an injunction bond given to plaintiff and others, as obligees, plaintiff alone may sue, if the property on which the injunction operated was his sole property, and the injury his alone, the complaint averring these facts. *Browner* v. *Davis*, 15 Cal. 11.

93. In an action on such bond, no demand for payment of unliquidated damages need be made on the parties for whom the sureties—that is, the obligors—stipulated. *Ib.*

VI. In Replevin.

94. If an action of replevin be improperly commenced, the party bringing it, having obtained the benefit, cannot avoid the undertaking he has given by pleading his own misfeasance. *Turner* v. *Billagram*, 2 Cal. 522.

95. A replevin bond was made to the sheriff instead of the party to be protected by it, by mistake, and then corrected; this did not invalidate the bond. *Ib.*

96. Where a replevin bond substantially conforms to the act, and no variation exists, the assignee of the defendants can maintain an action upon it. *Wingate* v. *Brooks*, 3 Cal. 112.

97. A party who sues out a replevin from a justice's court, having no jurisdiction, and obtains the property, cannot in an action on the bond set up as a defense the want of jurisdiction of the justice. *McDermott* v. *Isbell*, 4 Cal. 114.

98. Where the defendant in a replevin suit failed to claim the return of the property in his answer, and on the trial the jury found a verdict for the defendant, on which the court rendered judgment against plaintiffs for costs, which was paid: held, that the payment of the judgment as taken was a complete discharge of plaintiffs' sureties on the undertaking. *Chambers* v. *Waters*, 7 Cal. 390.

99. In an action of replevin, where the defendant has required the return of the property, and given an undertaking for such purpose, a judgment for plaintiff, in order to hold the sureties on the undertaking, must be in the alternative as required by the code. *Nickerson* v. *Chatterton*, 7 Cal. 570.

100. The sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against defendant. *Ib.*

101. Where the recovery of the property is the primary object of the suit, as in some case where damages will not compensate plaintiff, he should frame his bill in equity specifying the reasons therefor, and then a decree can be made to compel specific delivery. *Ib.*

102. In an action against the sureties on replevin bond, it is necessary to allege and prove that the property was delivered to the party requiring it, and for whom the bond was given. *Ib.* 572.

103. The liability of the sureties cannot be more than the value of the property fixed by the judgment in the original suit. *Ib.*

104. Where the plaintiff in replevin gives the statutory undertaking and takes possession of the property in suit, and is afterwards nonsuited and judgment entered against him for the return of the property and for costs: held, that his sureties are liable for damages sustained by defendant by reason of a failure to return the goods, but not for damages for the original taking

and detention, the value of the goods not having been found by the jury. *Ginaca* v. *Atwood*, 8 Cal. 448.

105. The facts which upon a trial by jury would have been found in the original replevin suit, are by a nonsuit therein left to the jury called in the suit on the undertaking, so far as the conditions of the undertaking will authorize an inquiry into them. *Ib.*

106. T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff H., as sheriff. M. J., wife of J., claimed the property as sole trader, and brought her action of replevin for the property, and obtained possession of the same by the delivery of the statutory undertaking. The undertaking was executed by defendants R. and S. The replevin suit was decided February 5th, 1855, in favor of H. T. obtained judgment in the attachment suit against J., November 30th, 1854. On the eighteenth of February, 1855, executions in favor of other creditors of J. coming into the hands of H., as sheriff, he levied them on the same property, sold them and paid the proceeds into court. H. then brought suit against the sureties in the replevin bond: held, that the lien of T.'s attachment continued after the replevy of the goods by M. J. *Hunt* v. *Robinson*, 11 Cal. 277.

107. When the same property came into the hands of H., as sheriff, the condition of the replevin bond to return the property was fulfilled. *Ib.*

108. In an action on a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. *Ib.* 279.

VII. Bail Bond.

109. Where a bail bond is given to appear and answer an indictment, the complaint must aver that the indictment was found or is pending. *People* v. *Smith*, 3 Cal. 272.

110. If the condition be "to appear whenever the indictment may be prosecuted," and there is no averment in what court it was prosecuted, it is error, and a loose statement "that the accused was called" in the said court of sessions is not sufficient. *Ib.*

111. A bail bond need not state in what court the defendant shall appear, as the law provides in what court he shall be tried. *People* v. *Carpenter*, 7 Cal. 403.

112. Sureties to a bail bond cannot avail themselves, in defense to an action thereon, of an insufficiency of the justification of the undertaking. *Ib.*

113. The sureties on the bail bond of a defendant arrested in a civil action are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody. *Allen* v. *Breslauer*, 8 Cal. 554.

VIII. Of a Receiver.

114. Where plaintiff filed a bill in equity for the appointment of a receiver and other relief, and the court refused to appoint a receiver on condition that defendant file a bond to account as receiver, which defendant did, a judgment for $20,000 dollars was rendered against defendant in the suit, and proper demand being made and refused, suit was brought by plaintiff on the bond, which was made payable to the people of the State of California: held, that the plaintiff could recover thereon. *Baker* v. *Bartol*, 7 Cal. 553.

115. The defendant having received the benefit of this bond, is estopped from denying its legality. *Ib.*

USE AND OCCUPATION.

1. A subtenant can be made liable to the original lessor in an action for use and occupation, or for rent, only for the time during which the occupancy of the premises by the subtenant continued. *Pierce* v. *Minturn*, 1 Cal. 474.

2. A description of premises in a lease, though imperfect, is sufficiently certain if the boundaries of the premises can be ascertained with a reasonable degree of cer-

tainty, and they have been taken possession of and occupied under the lease. *Ib.*

3. Under our code, plaintiff may recover real property, and damages for withholding it, and rents and profits, all in one action. *Sullivan* v. *Davis*, 4 Cal. 292.

4. A claim for possession of real property, with damages for its detention, cannot be joined in the same complaint, under any system of pleading, with a claim for consequential damages arising from a change of a road by which a tavern keeper may have been injured in his business. *Bowles* v. *Sacramento Turnpike and Plank Road Co.*, 5 Cal. 225.

5. In an action of ejectment where no proof is introduced to show damages, it is no error to refuse to allow the defendant to prove the value of the improvements made by him on his property. *Ford* v. *Holton*, 5 Cal. 321.

6. Where the prayer for damages for more than two hundred dollars is inserted in a complaint in a justice's court, in an action for the recovery of possession of a mining claim, it should be disregarded or stricken out, and the plaintiff allowed to try his right to the claim. *Van Etten* v. *Jilson*, 6 Cal. 19; *Grass Valley Q. M. Co.* v. *Stackhouse*, 6 Cal. 414.

7. Where the defendant in ejectment occupied and improved the land bona fide under color of title, the improvements erected by him constitute an equitable set-off, to the extent of their value, to the damages recovered by the plaintiff for the withholding of possession. *Welch* v. *Sullivan*, 8 Cal. 511.

8. Where claimants to land had prior to the issuance of a patent published a notice that they had become the owners of the grant, specifying its boundaries and warning off trespassers, it might possibly operate as a protection against any demand for damages until the approved survey was made. *Moore* v. *Wilkinson*, 13 Cal. 489.

9. Where in ejectment against several defendants the judgment for damages is several instead of joint, the damages may be remitted and the judgment for the land stand. *Curtis* v. *Herrick*, 14 Cal. 120.

10. In ejectment, the value of improvements, even when defendant holds under color of title adversely to plaintiff, can only be allowed as a set-off to damages. *Yount* v. *Howell*, 14 Cal. 466.

11. Damages which a plaintiff can recover in an action of ejectment for the use and occupation of the premises are such as arise subsequent to the accruing of his right of possession, and when his right depends upon a sheriff's deed, he cannot recover in this form of action for the use and occupation for the six months intervening the sale and the execution of the deed. *Yount* v. *Howell*, 14 Cal. 468; *Clark* v. *Boyreau*, 14 Cal. 637.

12. Where the complaint in ejectment avers the ownership and right of plaintiff, and the possession and withholding by defendant in general terms, without stating any time when plaintiff's title accrued or existed, and without making any allegation as to damages for rents and profits, but simply praying judgment therefor in a given sum, and the complaint is demurred to as not stating facts sufficient, and a general judgment for possession and $2,250 damages is given: held, that damages cannot be recovered for any period preceding the commencement of the action; but that this point, to wit: that the complaint does not support the judgment for damages, cannot be raised for the first time on petition for rehearing in the supreme court—the defendant on the first hearing in this court having put his objection to the general judgment for damages on the ground of error in the charge of the court below to the jury, and of error in the admission of evidence as to the rents and profits, the point of his objection being that a recovery for rents and profits beyond three years was barred by the statute, and this court having decided against him because the point was not properly made by the record. *Payne* v. *Treadwell*, 16 Cal. 248.

13. In this case the judgment for damages must stand, as this court has no means of determining the manner in which the damages were made up by the jury, or whether any damages for the period preceding the commencement of the action were found. *Ib.*

14. Where damages are claimed for use and occupation prior to the commencement of the action, the complaint must state the title of plaintiff as existing at some prior date (to be designated) and as continuing up to the commencement of the action, and the entry of defendant at some date subsequent to that of the alleged title. *Ib.*

15. Where in ejectment the facts found by the court authorized a judgment for possession but not for damages, the judgment being for possession and damages was affirmed in the supreme court upon respondents remitting the damages and paying costs of appeal. *Doll* v. *Feller*, 16 Cal. 434.

See EJECTMENT, LAND, LANDLORD AND TENANT, LEASE, RENT.

USURY.

1. To establish usury, the party must show that the rate agreed upon was greater than the customary rate at the time and place of the contract. *Fowler* v. *Smith*, 2 Cal. 570.

VACANCY.

1. The absence of a judge from the State is not such a vacancy as can be supplied by the executive under legislative authority. *People* v. *Wells*, 2 Cal. 198, 610.

2. Vacancy in office is a fact, the existence of which, like any other fact, is susceptible of being ascertained. It can only be said to exist when the office or place has no legal incumbent to discharge the duties. The law does not presume every temporary absence from the discharge of the duties of the office creates a temporary vacancy. *Ib.* 204.

3. An office is not vacant for the reason that the incumbent is not at present discharging his duties; it cannot become vacant without the proper judgment of law. *Ib.*

4. The legislature may provide how a legal vacancy may be supplied, but it has no power to say what will constitute one. *Ib.* 205.

5. The constitutional power of filling vacancies vested in the governor applies only to vacancies occurring under circumstances where the appointing power or electing power cannot act. *People* v. *Fitch*, 1 Cal. 535.

6. Such power is limited by the period when the people or the legislature can elect or appoint, on the arrival of which his power ceases, and the right of appointment returns to the original appointing power. *Ib.*

7. The power to fill an office carries by implication the power to fill a vacancy. *People* v. *Fitch*, 1 Cal. 535; *People* v. *Campbell*, 2 Cal. 137.

8. An appointment to fill a vacancy in the office of State printer, under the act of 1850, made by the governor during the session of the legislature, is void. *People* v. *Fitch*, 1 Cal. 535.

9. Elections to fill vacancies occasioned by the death or resignation of an officer are special elections, and the proclamation of the governor is necessary to fill them. *People* v. *Porter*, 6 Cal. 28; *People* v. *Weller*, 11 Cal. 65; *People* v. *Weller*, 11 Cal. 339; *People* v. *Martin*, 12 Cal. 411; *People* v. *Rosborough*, 14 Cal. 187.

10. There can be no vacancy in the office of sheriff caused by the death, removal or resignation of the incumbent; for upon the happening of such an event, the coroner by operation of law becomes the sheriff. *People* v. *Phœnix*, 6 Cal. 93.

11. The act to establish an insane asylum provided that the resident physician shall hold his office for two years, and until his successor is appointed and qualified: held, that on failure of the legislature to elect at the expiration of the incumbent's term, the office becomes de jure vacant, and can be filled by the governor, under article five, section eight of the constitution. *People* v. *Reid*, 6 Cal. 289; *People* v. *Mizner*, 7 Cal. 524; *People* v. *Langdon*, 8 Cal. 14.

12. In an action by one claiming to have been elected to an office, against his predecessor, to compel a surrender of the books, papers, etc., belonging to the office, plaintiff must show prima facie that a vacancy existed in the office, and that he was elected to fill it. *Doane* v. *Scannell*, 7 Cal. 395; *People* v. *Scannell*, 7 Cal. 436.

13. The consolidation act of San Francisco gives the officers named in the fourteenth section two days after the meeting

of the board of supervisors, in which to file new bonds. The meeting taking place on the ninth of July, the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane* v. *Scannell*, 7 Cal. 395; *People* v. *Scannell*, 7 Cal. 436.

14. Taking the different provisions of the statutes together as constituting one entire system, and it would seem clear that the law does not intend there should be a continued vacancy in any office, and for that reason it gives certain inferior jurisdictions the right to make a prompt, summary and ex parte declaration that the office is vacant, and at once to fill the vacancy by appointment, so that the question may be as speedily settled as possible by proceedings in the nature of a quo warranto. *People* v. *Scannell*, 7 Cal. 439.

15. Where the appointment to an office is vested in the governor, with the advice and consent of the senate, and the term of the incumbent expires during a recess of the legislature, and the governor appoints a successor in office: held, that this appointment vested in the appointee a right to hold his office for the full term, subject only to be defeated by the nonconcurrence of the legislature. *People* v. *Mizner*, 7 Cal. 523.

16. Vacancy in office can only be said to exist when the office or place has no legal incumbent to discharge the duties of the office. *Ib.*

17. The power to fill vacancies had to be vested in some department of the government, and the constitution was compelled to vest it in the executive, because the only department that could be properly and efficiently charged with such a duty. But the constitution carefully limited this power to fill vacancies, for the time only, and when the appointing power for the whole time can act, the appointment of the executive for the time being ceases. *Ib.* 525.

18. Power to fill a vacancy and power to fill an office are distinct and substantial in their nature. *People* v. *Langdon*, 8 Cal. 15.

19. When the constitution clearly enumerates the events that shall constitute a vacancy in a particular office, we must suppose all other causes of vacancy excluded, especially when this construction can lead to no injurious consequences. *People* v. *Whitman*, 10 Cal. 45.

20. The power to declare an office vacant is vested under the statute where the duty to approve of the bond of the officer is lodged. That duty is imposed upon the county judge and not the supervisors, and where the supervisors of Marin county declared the office of constable vacant because the constable failed to comply with their order to file a new bond: held, that they had exceeded their jurisdiction. *People* v. *Supervisors of Marin County*, 10 Cal. 346.

21. The governor might fill a vacancy, but the appointee would only hold, by virtue of his appointment, until the next general election, or at most, until the qualification of the person to be then chosen by the people. *People* v. *Rosborough*, 14 Cal. 187.

22. The act of 1851, providing for the election of a district attorney in each county, at the general election of that year, and every two years thereafter, etc., and the act of 1855, providing that the board of supervisors in each county shall fill vacancies in the office of district attorney, their appointee to hold until the next general election, the person then elected to hold for the balance of the term of the person whose place he is elected to fill, apply to the city and county of San Francisco, and are not repealed by the ninth, nor by the last section of the consolidation act of 1856. *People* v. *Brown*, 16 Cal. 443.

VACATION.

1. A judgment rendered by a district court in vacation and after the time appointed for the adjournment of the term, is invalid, and will be set aside. *Smith* v. *Chichester*, 1 Cal. 404; *Coffinberry* v. *Horrill*, 5 Cal. 493; *Peabody* v. *Phelps*, 7 Cal. 53; *Wicks* v. *Ludwig*, 9 Cal. 175.

2. After the adjournment of the term, no power remains in the district court to set aside the judgment, or grant a new trial, except as provided by statute, unless the right is saved by proper motion. *Baldwin* v. *Kramer*, 2 Cal. 583; *Morrison* v. *Dopman*, 3 Cal. 257; *Suydam* v. *Pitcher*, 4 Cal. 281; *Carpentier* v. *Hart*, 5 Cal. 407; *Robb* v. *Robb*, 6 Cal. 22; *Shaw* v. *McGregor*, 8 Cal. 521.

VAN NESS ORDINANCE.

1. If the city of San Francisco has any title by virtue of the act of Congress, and can by her own charter make a voluntary disposition of her lands, then all such lands are relinquished by virtue of the so-called Van Ness ordinance to those in actual possession, without regard to rights of third parties. *Welch* v. *Sullivan*, 8 Cal. 201; *Hart* v. *Burnett*, 15 Cal. 614; *Holladay* v. *Frisbie*, 15 Cal. 637.

2. The act of the State legislature of March, 1858, confirming the so-called Van Ness ordinance, was a legal and proper exercise of the sovereign power; and this act gave full effect to the provisions of that ordinance, and vests in the possessors therein described, as against said city and State, a title to the lands in said ordinance mentioned. *Hart* v. *Burnett*, 15 Cal. 616.

3. Whatever interest the city of San Francisco, as defined by the charter of 1851, had in the beach and water-lot property, on the first day of January, 1855, was transferred to and vested in the parties who were in the actual possession thereof on that day—provided their possession was continued up to June 20th, 1855, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process—by virtue of the Van Ness ordinance and the act of March 11th, 1858, ratifying and confirming the same, and such parties can defeat the claim of plaintiff who holds under a conveyance by the president and two members of the board of land commissioners, created by act of May 18th, 1853, providing for the sale of the State's interest in the property within the water line front, as defined by the act of March 26th, 1851. *Holladay* v. *Frisbie*, 15 Cal. 637.

4. The act of the legislature of 1858, validating the alcalde grants, mentioned in the proviso to the second section of the Van Ness Ordinance, is effectual for that purpose, whether the grants were originally valid or not, or whether the title of the city of San Francisco came by grant to the old pueblo, or had its origin, by presumption or grant, in the act of Congress. *Payne* v. *Treadwell*, 16 Cal. 232.

See ORDINANCE, SAN FRANCISCO.

VARIANCE.

1. Where the plaintiff declared upon a note made by one McKinley and one Campbell, and gave in evidence a note signed by H. C. McKinley and C. Campbell & Co.: held, that the variance was important and substantial, and the evidence could not be admitted. *Cotes* v. *Campbell*, 3 Cal. 191.

2. Where the declaration was upon the note, and there was but one count, and the court found that the note was never given, but that the indebtedness of defendant to plaintiff was for merchandise sold: held, that the finding was against the averment, and could not support the judgment. *Lewis* v. *Myers*, 3 Cal. 476.

3. The allegata and probata must correspond, and it therefore follows that when forcible entry is alleged, a forcible entry must be proven. *Frazier* v. *Hanlon*, 5 Cal. 159.

4. The plaintiff allleged that Hull & Co. were indebted to him, but failed to prove that there were others in company with Hull in the transaction: held, that the words "and company" might be treated as surplusage, and the action proceed as against Hull alone. *Milliken* v. *Hull*, 5 Cal. 246.

5. In an action of assumpsit for goods sold and delivered, the plaintiff cannot recover for goods alleged to have been delivered to a third party, and charged to defendant's account. *Williams* v. *Chadbourne*, 6 Cal. 561.

6. Where the complaint in an action on a bill of exchange describes it as payable to the order of A, whereas the bill offered in evidence is drawn payable to B, it is a variance to be taken advantage of by objecting to the evidence, or by a motion for a nonsuit. *Farmer* v. *Cram*, 7 Cal. 136.

7. In an action for an alleged libel, a variance between the date of the libel as set forth in the complaint, the twenty-third of June, and the date as shown in the evidence, the twenty-fourth of June, is not material, unless the defense is misled by it. *Thrall* v. *Smiley*, 9 Cal. 536.

8. It is a cardinal rule in equity as in all other pleading, that the allegata and probata must agree, and that the averments material to the case omitted from the

pleading cannot be supplied by the evidence. *Green* v. *Covillaud*, 10 Cal. 331.

9. In chancery cases the party must recover according to the pleadings, and not the proof, where there is a variance. *Tryon* v. *Sutton*, 13 Cal. 494.

10. The variance between the date of the alleged seizing and right of possession of the plaintiff on the first of January, 1857, and the date of the conveyance to him, May 22nd, 1858, is immaterial, the latter being previous to the commencement of the action. *Stark* v. *Barrett*, 15 Cal. 365.

11. In a foreclosure suit on bond and mortgage, the fact that the bond offered in proof on the trial does not answer the description of the bond as recited in the mortgage, is matter of identity merely, and not properly matter of variance—the bond offered answering to the description given in the complaint. *Blankman* v. *Vallejo*, 15 Cal. 643.

12. In an action of forcible entry and detainer, the complaint described the premises as "about ten rods square, situated within and comprising the northwesterly corner of that certain piece or parcel of land, bounded and described as follows, to wit:" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres.) "The said ten rods square being situated from twenty to fifty feet, more or less, south-easterly from the house of defendant, and near the gate aforesaid, and near the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter's Point." Said gate was where this last road passed through. The proof, among other things, showed this ten rods to be called the north-easterly instead of the north-westerly corner of the tract. The judgment for plaintiff followed the description in the complaint. Defendant appeals: held, that the variance in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the north-easterly instead of the north-westerly corner, was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul* v. *Silver*, 16 Cal. 75.

13. Distinction between proof of allegations of matter of substance and allegations of matter of description, stated. *Castro* v. *Wetmore*, 16 Cal. 380.

See ANSWER, COMPLAINT, EVIDENCE, PLEADING.

VENDOR AND VENDEE.

1. Damages which do not legally result from the breach of the contract cannot be recovered unless they are specially claimed and set forth in the pleading; thus, damages sustained by a vendee of goods by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him, and in an action by his vendor against him, cannot be recovered from the plaintiff's claim, unless such damages are specially alleged and set forth in the answer. *Cole* v. *Swanston*, 1 Cal. 54.

2. Where a contract is made to convey land, by a quit claim deed, at a future time, an action cannot be maintained by the vendee against the vendor, on the ground that a third person has intruded upon a portion of the land, and the vendee cannot obtain possession, there being no stipulation in the contract that the vendee shall be put in possession. *Tewksbury* v. *Laffan*, 1 Cal. 130.

3. Nor can such action be sustained on the ground that the vendor, long after the execution of the contract, gave the vendee a certificate to the effect that at the time of making the agreement he consented and agreed that the vendee should take possession of the lot forthwith. *Ib.*

4. The memorandum required by the statute of frauds to be entered by an auctioneer in his sale book must be made at the very time of the sale, or the vendee will not be bound by the contract; and the memorandum made in the afternoon or next day after the sale is insufficient. *Craig* v. *Godeffroy*, 1 Cal. 415.

5. The memorandum of an auctioneer is looked upon as a contract between the vendor and vendee reduced to writing, and executed by their mutual agent, who ceases to be such after the sale is closed. *Ib.*

6. Where the defendants stipulated to sell to the plaintiffs certain merchandise, "shipped" from Batavia, in the island of Java, for the port of San Francisco, and the parties agreed that the contract should be considered as binding until the arrival of the vessel: held, that the fulfillment of it, on either side, depended on the contingency of the ship's arrival, and an action could not be maintained by the vendee of the goods, it appearing that the ship had never arrived at her port of destination. *Middleton* v. *Ballingall*, 1 Cal. 446.

7. In an action for the purchase money of land conveyed by deed without covenants, want of title in the vendor is no defense unless the vendee has been evicted. *Fowler* v. *Smith*, 2 Cal. 44.

8. A vendor has a lien on the land sold for the purchase money, unless he has taken security for its payment, though he has executed the conveyance. *Salmon* v. *Hoffman*, 2 Cal. 142.

9. Where a vendor, under a power to sell in a mortgage, received instead of money an article of fluctuating value, he is chargeable with the highest value of the lot sold. *Benham* v. *Rowe*, 3 Cal. 408.

10. In a suit for the recovery of the purchase money of land, founded on a contract, in which the plaintiff contracted to deliver a warrantee deed for the land, the defendant, in his answer, denied that the plaintiff was the lawful owner, or that he held any title to the land: held, that to enable him to rescind the contract, the defendant was bound to aver and to show a paramount title in another, and that, failing in this, his defense to the action was defective. *Thayer* v. *White*, 3 Cal. 229.

11. A vendee may avail himself of fraud, breach of warranty, or failure of consideration, by way of defense in an action upon a contract. *Flint* v. *Lyon*, 4 Cal. 21.

12. When an auctioneer sells a balance of goods, without specifying their quantity, he has a reasonable time to ascertain it. When this is done, and a bill of particulars is made out and delivered to the purchaser, who pays the purchase money, or a portion of it, the contract becomes executed, and the auctioneer will not afterwards be permitted to allege a mistake as to quantity. *Burgoyne* v. *Middleton*, 4 Cal. 66.

13. A vendor of real estate, who makes no conveyance, but gives a bond, conditioned for the execution of a conveyance, on payment of the purchase money by the vendee, has an equitable lien on the land for the purchase money, and holds the legal title as a security for the enforcement of his lien. *Gouldin* v. *Buckelew*, 4 Cal. 111.

14. A failure on the part of a vendee to pay the purchase money, for two years and more, does not forfeit his right under the contract, as the vendor may proceed to enforce the payment of the debt at any time after it becomes due. *Ib.*

15. When the vendor, under a power of sale reserved in such a contract, sells the property either at public or private sale, the surplus beyond the purchase money due belongs to the vendee, and the payment of it may be decreed by judgment of the court against the vendor. *Ib.* 112.

16. In order to rescind a contract for the sale of land, on the ground that the vendor cannot perform it, because he has no title to the land, it is necessary for the vendee to aver and show an outstanding paramount title in another. *Riddell* v. *Blake*, 4 Cal. 267.

17. A vendor of real estate made a conveyance of it to the vendee, leaving a balance of the purchase money unpaid: the vendee afterwards mortgaged the same property to a third party, who knew of the vendor's claim for unpaid purchase money: the vendor brought an action at law against the vendee, obtained judgment for the balance due, issued execution and sold the interest of the vendee in the property: the mortgagee afterwards foreclosed his mortgage and was about to sell the property: the purchaser at the previous sale obtained an injunction to stay the sale, which was afterwards dissolved by the court on the ground that he had purchased merely the vendee's equity of redemption, as the sale was subject to the rights of the mortgagee: held, that the judgment of the court below was correct, and that the claim of the purchaser to be subrogated to the equitable lien of the vendor, if available at all, must be asserted in a separate equitable action. *Allen* v. *Phelps*, 4 Cal. 258.

18. A conveyed land to B, and allowed part of the purchase money to remain unpaid; B afterwards sold part of the land to C, who had no notice of A's lien as vendor, and gave a mortgage to B for part of the purchase money. A ob-

tained judgment against B for the unpaid purchase money, and levied upon and sold B's interest in the land: held, that the purchaser at sheriff's sale did not acquire title to the mortgage debt due from C to B. *Bryan* v. *Sharp*, 4 Cal. 350.

19. C sold a lot of lumber to B, and A, who claimed it, notified B that the lumber belonged to him, and brought an action to recover the price: held, that the notice and form of action recognized the right of C to sell the lumber. There was no privity of contract between the plaintiff and the defendant. C was pro tanto the agent of A, and was entitled to collect the price, and the mere notice of A to B was insufficient to interrupt the completion of the performance of the contract between C and B. *Argenti* v. *Brannan*, 5 Cal. 353.

20. A vendor of real estate has a lien on the same in the hands of the administrator of the purchaser for the unpaid purchase money. *Cahoon* v. *Robinson*, 6 Cal. 226.

21. The right of a vendor to a stoppage in transitu exists until the goods arrive at their final destination or come into the possession of the consignee. Depositing the goods at an intermediate point with an agent of the vendee, to be forwarded, does not terminate the transitus. *Markwald* v. *His Creditors*, 7 Cal. 214.

22. Where the plaintiff sold a number of bales of drillings to A for the purpose of making sacks, deliverable to A as fast as he needed them for manufacturing, and A agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking the sacks as he should make his payments: held, that upon the delivery of the drills to A the title thereto vested in him, and that plaintiff had no lien thereon or on the sacks until they were delivered to him. *Hewlett* v. *Flint*, 7 Cal. 264.

23. Fraud in the vendor would not of itself vitiate the sale to an innocent purchaser without notice, and for a valuable consideration; but the fraudulent intent of the vendor being established, the jury must determine from the circumstances of the case whether the purchaser participated in the fraud. *Landecker* v. *Houghtaling*, 7 Cal. 392; *Visher* v. *Webster*, 8 Cal. 113: 13 Cal. 61; *Cohn* v. *Mulford*, 15 Cal. 62.

24. As a general rule, the vendor of goods is not a competent witness to impeach the sale made by himself. *Howe* v. *Scannell*, 8 Cal. 327.

25. Where evidence is introduced showing a collusion between vendor and purchaser to defraud the creditors of the former, the admissions of the vendor are admissible, and a fortiori, his sworn statement. *Ib.*

26. A vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase money. And the lien equally exists, whether the instrument amounts to a conveyance or merely to an executory contract. *Walker* v. *Sedgwick*, 8 Cal. 403.

27. A purchaser at sheriff's sale may have a lien upon the property prior to that of the redemptioner, the fact that he is a creditor does not divest the lien; he may be both a creditor and a purchaser and still have a prior lien to that of the redemptioner; this can only be so on the principle that the legal estate is still in the judgment debtor until the delivery of the sheriff's deed. *Knight* v. *Fair*, 9 Cal. 118.

28. In all cases where a mere lien exists, the legal estate may lie in some other party than the mortgagee; this legal estate and the consequent right to discharge the lien and save the estate is of value and can be sold. *Ib.*

29. No eviction is necessary to enable a vendee to recover back the purchase money of real estate, where the sale was void under the statute of frauds. *Reynolds* v. *Harris*, 9 Cal. 329.

30. Where a party contracts orally for the purchase of a house and lot and furniture therein, and enters into possession under such oral agreement, and the vendor subsequently fails to make a conveyance, the vendee has the right to quit the premises and return the personal property. *Ib.* 340.

31. Where the vendee's agent in the purchase of a tract of land, has actual notice of a mortgage on the premises at the time of purchase, the vendee will be presumed to have taken the property subject to the mortgage. *May* v. *Borel*, 12 Cal. 91.

32. A vendor's lien does not exist in this State where a mortgage security is taken for purchase money. The silent lien is extinguished, whenever he mani-

fests an intention to abandon or not to look to it. *Hunt* v. *Waterman*, 12 Cal. 305.

33. The fact that such mortgage is defective does not revive the lien, as it is the intention of the vendor which controls, and this is as well shown by an informal mortgage as one properly done. *Ib.*

34. A general averment in the complaint to enforce the vendor's lien, that the mortgage is defective as a security, is not sufficient to withdraw the case from the general rules above stated. *Ib.*

35. Equity raises no lien in relation to real estate, except that of a vendor for the purchase money. *Ellison* v. *Jackson Water Co.*, 12 Cal. 554.

36. Land on which a vendor's lien exists for the purchase money may become a homestead, but the homestead right is subordinate to the lien. *McHendry* v. *Reilly*, 13 Cal. 76.

37. The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee. *Sparks* v. *Hess*, 15 Cal. 192.

38. This equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The court, after determining the amount of the lien, can, by its decree, either direct a sale of the property for its satisfaction, and execution for any deficiency, or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case may require. *Ib.* 193.

39. Where the contract of sale of real property is unexecuted, the vendor retaining the legal title for security until all the purchase money is paid, the vendor's lien retained is different from the ordinary lien of a vendor after conveyance executed. In the latter case, the vendor has parted with the legal and equitable title, and possesses only a bare right, which is of no operative force or effect until established by the decree of the court. In the former case, the vendor's position is somewhat similar to that of a party executing a conveyance and taking a mortgage back. He may sue at law for the balance of his purchase money, or file his bill in equity for the specific performance of the contract, and take an alternative decree, that if the purchaser will not accept a conveyance and pay the purchase money, the premises will be sold to raise such money, and that the vendee pay such deficiency remaining after the application of the proceeds arising from such sale. *Ib.* 194.

40. In such case of an executed conveyance, the vendor may ask either a decree directing performance. and in case of refusal, a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract. He may, however, insist upon a sale where performance is refused, and is not bound to make a mere foreclosure of the vendor's right to a deed. *Ib.*

41. In suit to recover money due on a promissory note, and to establish a lien for the amount upon certain real estate, purchased with money advanced by plaintiff to defendant, and for which advance the note was given, the clerk entered judgment by default for the amount of the note. Plaintiff, having exhausted his remedies on this judgment, by executions and proceedings supplementary thereto, obtained from the court a decree for the equitable relief songht in the complaint, to wit: for a lien upon, and a sale of the real estate: held, that this decree was coram non judice, and void—assuming the judgment by the defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. *Kittridge* v. *Stevens*, 16 Cal. 382.

See CONTRACT, DEED, LIEN, SALE, SPECIFIC PERFORMANCE.

VENUE.

1. Affidavits on a motion to change the venue of a criminal action must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had in the county in which the indictment was found. *People* v. *McCauley*, 1 Cal. 383.

2. It is insufficient to state that a jury cannot be selected from a certain portion

of the county who would give the prisoner a fair and impartial trial, on the motion to change the venue. *People* v. *Baker*, 1 Cal. 404.

3. The granting of a change of venue is discretionary with the courts, subject to revision only in cases of gross abuse, yet they should be carefully guarded against, as they usually result in a total loss of all the rights involved. *Sloan* v. *Smith*, 3 Cal. 412.

4. The facts in the affidavit on motion to change the venue should be stated in such a manner as to enable the court to draw its own inference whether an impartial trial could be had in the particular case. *Ib.*

5. Where a motion was made to change the venue on the ground that neither of the parties resided in the district, where no objection was made in the answer, and nearly six months elapsed: held, that it was too late, and the motion could not be heard. *Tooms* v. *Randall*, 3 Cal. 440.

6. Causes may be removed from one district or county to another district or county in the manner provided by statute. *Reyes* v. *Sandford*, 5 Cal. 117.

7. The supreme court having complete power over the right to change the venue, it is not to be presumed it will trust implicitly in the discretion of inferior courts. *People* v. *Lee*, 5 Cal. 354.

8. Where one hundred citizens united in employing counsel to prosecute the defendant, held to be a sufficient ground for a change of venue. *Ib.*

9. Where a justice is interested in the event of a suit, the statute requires that he should transfer the case before another justice. *Larue* v. *Gaskins*, 5 Cal. 509.

10. An order refusing a change of venue, on the application of defendant in a criminal prosecution, will only be reviewed in cases of gross abuse of discretion. *People* v. *Fisher*, 6 Cal. 155.

11. An appeal does not lie from an order granting a change of venue. *Juan* v. *Ingoldsby*, 6 Cal. 440.

12. An order refusing to change the place of trial is not an appellate order, though it may be reviewed on appeal from the final judgement in the case. *People* v. *Stillman*, 2 Cal. 118; *Martin* v. *Travers*, 7 Cal. 253.

13. It is not error in the court on a trial for murder to postpone the consideration of a motion, on the part of a defendant, for a change of venue, until an attempt is made to empanel a jury. *People* v. *Plummer*, 9 Cal. 309.

14. Where a motion is thus postponed, and counsel for prisoner afterwards declines, on the intimation of the court, to renew the motion, he cannot take advantage, on appeal, of the failure of the court to order a change of venue. *Ib.*

15. Proceedings for a mandamus to compel the execution of a sheriff's deed to a redemptioner, after sixty days from the redemption, under section two hundred and thirty-two of the code, can be commenced in the county where the relator resides; the provision of the statute that actions against a public officer for acts done by him in virtue of his office shall be tried in the county where the cause, or some part thereof, arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interfere with the property or rights of third persons, and not to mere omissions or neglect of official duty. *McMillan* v. *Richards*, 9 Cal. 420.

16. Where the provision of the code requires an action to be tried in a particular county, there would be an exception in the case where a party seeks to enjoin several judgments fraudulently confessed in several counties against one judgment debtor. He may bring his action in any one of the counties. *Uhlfelder* v. *Levy*, 9 Cal. 615.

17. The right to have a cause tried in a particular county is one which a party may waive, either expressly or by implication. *Pearkes* v. *Freer*, 9 Cal. 642.

18. The writ of habeas corpus should not issue to run out of the county, unless for good cause shown, as the absence, inability, or refusal to act, of the local judge, or other reason, showing that the object and reason of the law requires its issuance. *Ex parte Ellis*, 11 Cal. 225.

19. The exhibition, by a judge, of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgment of the court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground

that the judge is disqualified from sitting. *Mc Cauley* v. *Weller*, 12 Cal. 523.

20. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy. And, in such case, there is no discretion in the court, the change being matter of right. *Watts* v. *White*, 18 Cal. 324.

21. The right to try particular cases in particular counties is a mere privilege, which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place. *Watts* v. *White*, 13 Cal. 324; overruling *Vallejo* v. *Randall*, 5 Cal. 462.

22. Defendant has a right to have the action tried in the county of his residence, except in certain cases specified in the statute. *Loehr* v. *Latham*, 15 Cal. 419.

23. On motion by defendant to change the place of trial, on the ground that he is sued in the county in which he does not reside, if plaintiff resist the motion because of the convenience of witnesses, the evidence as to the convenience should be as full and particular as that which is required upon an application, for this cause, to transfer the trial to another county. The affidavit must state the names of the witnesses. *Ib.*

24. As a matter of practice, where defendant moves to transfer the cause to the county of his residence, plaintiff may resist, by a counter motion to retain the cause on account of the convenience of witnesses, notwithstanding the residence of defendant, and then defendant can reply to the allegations as to the convenience of witnesses; or plaintiff, instead of a counter motion, may simply resist the motion of defendant; but reasonable time should be allowed defendant, if desired, to meet the matter set up in opposition to the original motion. *Ib.* 420.

25. The act of 1858 authorizes suit to be brought in any county designated in the complaint, when the residence of the defendant is unknown. But, to resist the application of defendant to change the place of trial, on the ground that he resides in a different county, plaintiff must show that he used all due diligence to ascertain the residence. *Ib.*

26. The practice upon this subject being unsettled, the parties, on the return of the cause, should have an opportunity of fully presenting the merits of the motion. *Ib.*

27. Query, whether in a foreclosure suit in the seventh district as to land situate in Contra Costa county, a party can appear and contest the case in San Francisco, before the judge of the seventh district, under a stipulation, and without exception as to the place of trial, and afterwards assign that fact as error. *De Leon* v. *Higuera*, 15 Cal. 495.

28. In actions to recover real property, the complaint need not state the residence of either of the parties; the statute provides for the trial in certain counties, and the situation of the premises, not the residence of the parties, determines the county. *Doll* v. *Feller*, 16 Cal. 433.

VERDICT.

I. In general.

1. The verdict of a jury upon a question of fact, in an action at law, is final and conclusive. *Perry* v. *Cochran*, 1 Cal. 180.

2. If the jury fails to find the fact of a lien, the court cannot render a judgment essentially different from the verdict, and the judgment so far will be reversed. *Walker* v. *Hauss-hijo*, 1 Cal. 186.

3. A stipulation that a verdict should be entered in favor of the defendant, saving to the plaintiff the same rights which he would have had in case a jury had actually rendered a verdict for the defendants, should be regarded in precisely the same light as a verdict, and be followed

by the same legal results. *Suñol* v. *Hepburn*, 1 Cal. 258.

4. The report of a referee on the facts of a case will be considered the same as the verdict of a jury. *Walton* v. *Minturn*, 1 Cal. 362.

5. If the statement discloses no refusal on the part of the judge of the court below to charge the jury on any matter submitted, nor is any erroneous charge assigned as error, the verdict of the jury must be considered as having settled all the facts of the case. *George* v. *Law*, 1 Cal. 364.

6. Where the court orders a new trial to be had, unless the judgment creditor will file a stipulation agreeing to remit a part of the verdict, and the judgment creditor acquiesces and files the remittitur, he waives his right to question the verdict. *Ib.* 365.

7. A jury should render their verdict from the facts and according to the law as given them; and it is improper to charge them "to take into consideration all the facts and do equal justice between the parties," inasmuch as it is so general in its terms that it may mislead them. *Kelly* v. *Cunningham*, 1 Cal. 367.

8. The verdict may conform to the issues. If the court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment and go beyond the verdict, it is error. *Ross* v. *Austill*, 2 Cal. 192.

9. The verdict must be confined to the matters put in issue by the pleadings. *Benedict* v. *Bray*, 2 Cal. 256; *Truebody* v. *Jacobson*, 2 Cal. 285.

10. Where a declaration states a condition precedent, and fails to aver performance, the defect must be urged on demurrer; it comes too late after verdict. *Happe* v. *Stout*, 2 Cal. 461.

11. The court below, sitting as a jury, must find, separately, the facts and conclusions of law, or they will be set aside; but this does not apply to a judgment by default where there are other defendants who go to trial. *Brown* v. *Brown*, 3 Cal. 111.

12. Where a jury has been waived by the parties, and the court finds the facts, they are not subject to review, but are conclusive. *Wheeler* v. *Hays*, 3 Cal. 286.

13. When the jury found the only issues involved in the controversy, an exception to the verdict, that it was not found upon the issues presented by the pleadings, will not be sustained. *Burritt* v. *Gibson*, 3 Cal. 399.

14. The court may direct special issues to be framed in equity cases and submitted to the jury with directions to find a special verdict. *Smith* v. *Rowe*, 4 Cal. 8.

15. The plaintiff in ejectment may sue one or more defendants, and they may answer separately, or demand separate verdicts; unless they do so, however, they will be concluded by a general verdict. *Winans* v. *Christy*, 4 Cal. 80.

16. An omission to allege delivery in an action on a bond, can be taken advantage of only on demurrer and not after verdict. *Garcia* v. *Satrustegui*, 4 Cal. 244.

17. Where an informal verdict is received and recorded by the consent of the plaintiff, and judgment in form is afterwards entered thereon; on appeal the informality will be disregarded. *Treadwell* v. *Wells*, 4 Cal. 263.

18. The appellate court must infer in favor of the verdict of the court below, unless error is clearly manifest. *Allen* v. *Phelps*, 4 Cal. 259.

19. The court should direct the verdict to be recorded as rendered by the jury. That will be treated as the verdict which the jury actually bring in. *Moody* v. *McDonald*, 4 Cal. 299.

20. A verdict arrived at, where each juror sets down a sum according to his own judgment, and the aggregate should be divided by twelve and the quotient should be returned as the verdict, is irregular and will be set aside, unless such means were merely adopted to arrive at a proper result, and they subsequently agreed on that sum. *Wilson* v. *Berryman*, 5 Cal. 45.

21. The verdict of the jury, which finds the defendant guilty of an assault with a deadly weapon with intent to commit great bodily injury, is irregular, and we deem that it finds the defendant guilty of a public offense. *People* v. *Davidson*, 5 Cal. 134.

22. When property is delivered and accepted pending the suit and before verdict, the damages for the detention should be merely nominal; if after verdict, then interest on the highest value between the time of conversion and the verdict, except special damage was declared upon. *Conroy* v. *Flint*, 5 Cal. 328.

23. A joint verdict against the defendants answering, and a defaulting defendant, is conclusive against all defendants, when a separate verdict has not been demanded. *Anderson* v. *Parker*, 6 Cal. 200.

24. On a trial under an indictment for murder, a verdict of "guilty" imports a conviction on every material allegation in the indictment, and is therefore a conviction for murder. *People* v. *March*, 6 Cal. 547.

25. The party in whose favor a judgment is rendered on a special verdict must move for a new trial, if he is not satisfied with the verdict, as the latter must otherwise be conclusive upon the facts in the appellate court. *Garwood* v. *Simpson*, 8 Cal. 108; *Duff* v. *Fisher*, 15 Cal. 380.

26. Where the failure to present the issues for a special verdict was the result of the plaintiff's own motion, he cannot be allowed to take advantage of it. *Brewster* v. *Bours*, 8 Cal. 505.

27. Defects in the indictment are not cured by verdict, but may be taken advantage of by motion on arrest of judgment. *People* v. *Wallace*, 9 Cal. 32.

28. The verdict of a jury is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the clerk. *Reynolds* v. *Harris*, 8 Cal. 618.

29. The objection to the form of the verdict should have been made on motion for a new trial. *Douglass* v. *Kraft*, 9 Cal. 564.

30. Where it is manifest from the testimony stated in the record, that the verdict of the jury must have been given under a state of great excitement, preventing a fair and just trial, and the court below has refused a new trial, this court will reverse the judgment and order a new trial. *People* v. *Acosta*, 10 Cal. 196.

31. Counsel in the trial of a cause cannot object that the court did not render judgment on the special verdict of the jury, where they have stipulated that such additional facts may be found by the judge as would in his judgment be sufficient to present all the questions raised by the pleadings. *Marius* v. *Bicknell*, 10 Cal. 224.

32. Where a jury are instructed to bring in a sealed verdict, and they retire, and after agreeing upon a verdict, seal it up and give it to the officer in charge of them—the clerk being absent—and request him to give it to the clerk, which is done; and after the meeting of the court the following morning the verdict is opened in the presence of the jury, and read by the clerk without exception: held, that this is not an error sufficient to warrant a new trial. The possession by such officer left the verdict as much in the possession of the court itself as if it had been directly delivered to the clerk. *Paige* v. *O'Neal*, 12 Cal. 493.

33. The opportunities of tampering with jurors after separation are so numerous, and in important cases the temptation is so great, and the ability of detection so slight, as to make it a matter of grave doubt whether sound policy does not require an adherence to the verdict as sealed, even as against a subsequent dissent of one or more of the jurors. *Ib.* 494.

34. In chancery cases the court below may disregard the verdict of a jury. *Goode* v. *Smith*, 13 Cal. 84.

35. Where, on suit against defendants as members of a quartz company, one defendant pleads that he was not a member of the company, and the finding of the court is that the allegations of the complaint are true, and that said defendant was a member of the company, as to plaintiff Parke, the finding supports a a judgment for plaintiff. *Parke* v. *Hinds*, 14 Cal. 418.

36. An objection that the finding is qualified by the words "as to plaintiff Parke," and that the facts showing the special relation to him ought to have been found, should have been taken below, and cannot be raised for the first time on appeal. *Ib.*

37. In ejectment, the verdict may be joint against several defendants, without specifying their respective lots in a whole tract, where they file a joint answer which contains no averment as to the particular portion of land occupied by each, no proof being offered on the point, no damages being claimed, and defendants being in possession. *Mc Garvey* v. *Little*, 15 Cal. 31.

38. On an indictment for murder, the verdict must state whether it be murder in the first or second degree, and if on the return of the verdict it does not specify the degree, the court should order the jury to retire and return a specific finding of the degree. *People* v. *Marquis*, 15 Cal. 38.

39. In suit against several defendants

known as "Table Mountain Water Co.," for possession of a ditch, the verdict was, "we find for the plaintiff and against L.," one of the defendants. Judgment was entered that defendant surrender possession of the ditch to plaintiff, and that plaintiff recover of L," one of said defendants, the sum of ——, his costs," etc.: held, that there is no error in the judgment; that it must be construed by the verdict which is confined to plaintiff and L. *Treat* v. *Laforge*, 15 Cal. 41.

40. A general verdict does not operate as an estoppel, except as to such matters as were necessarily considered and determined by the jury. A verdict is never conclusive upon immaterial or collateral issues. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 15 Cal. 148.

41. A verdict found on any fact or title distinctly put in issue is conclusive in another action between the same parties or their privies in respect of the same fact or title. *Kidd* v. *Laird*, 15 Cal. 182.

42. When a verdict is general, its effect will be limited to such issues as necessarily controlled the action of the jury. *Ib.*

43. Where a jury is waived and the cause tried by the court, the court should find the facts, and not merely state the proof. *Heredink* v. *Holton*, 16 Cal. 104.

44. On the rendition of a special verdict the trial is terminated, and notice of motion for new trial must be given within two days thereafter, or the proceedings based upon such notice will be disregarded. *People* v. *Hill*, 16 Cal. 117.

45. A special verdict settles the facts, and by its judgment pronounces the conclusions of law upon the facts found. If the court errs in this respect, the error may be reviewed without any motion for new trial; but the right to correct the verdict does not depend upon the judgment, and the steps necessary for that purpose must be taken within the statutory time. *Ib.*

II. When set aside.

1. *For Excessive Damages.*

46. Courts reluctantly interfere with the findings of a jury in an action for unliquidated damages for reason that the damages are excessive; and the verdict ought never to be set aside for such a cause unless beyond a doubt the verdict be unjust and oppressive, or obtained through some undue advantage, mistake, or in violation of law. *Payne* v. *Pacific Mail S. S. Co.*, 1 Cal. 36.

47. Courts will not interfere with the verdicts of a jury where the question upon which they have passed is one solely of unliquidated damages, unless the verdict be beyond doubt unjust and oppressive, especially if the judgment creditor remit one-half of it. *George* v. *Law*, 1 Cal. 364.

48. A verdict will be set aside where the damages are unjustifiably outrageous. *McDaniel* v. *Baca*, 3 Cal. 338.

49. Where damages are laid at a certain sum in a declaration, the judgment will be reversed if the jury render a verdict for a greater sum. *Palmer* v. *Reynolds*, 3 Cal. 396.

50. It is the proper exercise of the discretion of a court to grant a new trial on the ground of excessive damages, when the verdict is grossly inconsistent in its relations to the facts. *Potter* v. *Seale*, 5 Cal. 411.

51. In an action for a malicious prosecution wherein an attachment was issued, the jury gave $15,000 damages, and where no misconduct was shown on the part of the jury, and it was not charged that the verdict was given under the influence of passion or prejudice, the court could not disturb the verdict, unless it clearly appear that injustice had been done. *Weaver* v. *Page*, 6 Cal. 685.

See Damages.

2. *For Incompetent Juror.*

52. A verdict of a jury will not be set aside on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject matter of the suit, where no objection to him was raised until after the verdict was rendered, and it not appearing that he had formed or expressed an opinion before the trial, or was in any way biased in favor of plaintiff. *Lawrence* v. *Collier*, 1 Cal. 37.

3. *For Mistake or Fraud.*

53. Where the jury pass upon a question purely of fact, their verdict should not be set aside unless for mistake, fraud, misconduct or other improper influence. *Payne* v. *Jacobs*, 1 Cal. 40.

54. Courts cannot interfere with the finding of a jury unless impeached for fraud, mistake or other improper conduct, and the appellate court will not attempt to exercise a power over the verdicts of juries which is denied to the courts in which the verdict may have been rendered. *Ib.* 41.

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4. *As against Law.*

55. If it appears from the evidence spread upon the record that the verdict was against law, the appellate court will not hesitate to reverse the order of the court below refusing to grant a new trial. *Payne* v. *Jacobs*, 1 Cal. 40.

56. A new trial will be ordered although a verdict may not be excessive, if the court is satisfied that an improper charge went to the jury, and the fact that it had no effect upon them does not clearly appear. *Yonge* v. *Pacific Mail S. S. Co.*, 1 Cal. 354.

57. Though the charge of a jury may in the abstract be too broad, yet if it could have had no effect upon the verdict, it will not be reviewed. *Clark* v. *Mc Carthy*, 1 Cal. 454.

58. A new trial will be granted when the court is satisfied that the jury were misdirected in the charge, and thereupon founded their verdict. *Gunter* v. *Geary*, 1 Cal. 468.

59. Where no error is disclosed in the record, the verdict of the court below will not be set aside by the appellate court. *Wilson* v. *Middleton*, 2 Cal. 56; *Porter* v. *Barling*, 3 Cal. 73; *Thompson* v. *Monrow*, 2 Cal. 100.

60. Where, from the whole case, it appears that justice has been done, though errors were committed which did not materially affect the merits, the court will not disturb the verdict. *Clayton* v. *West*, 2 Cal. 382.

61. The court will require a case of very palpable mistake or error to be made out before it will overrule the verdict of a jury on issue of fact found in an action for the diversion of water. *Brown* v. *Smith*, 10 Cal. 571.

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5. *As against Evidence.*

62. To authorize a court to set aside a verdict which is clearly contrary to evidence, the finding must be impeached for some legal cause, and the appellate court will examine the evidence embodied in the record to ascertain whether an outrage upon the rights of any of the parties has been committed by the jury. *Payne* v. *Jacobs*, 1 Cal. 41.

63. Where the defense to an action is that there was no contract in writing of the sale, but the evidence given at the trial did not appear to be fully returned, and there appeared to have been no objection raised or exception taken to the insufficiency of the evidence, the appellate court will presume that the evidence was sufficient to warrant the verdict. *Bunting* v. *Beideman*, 1 Cal. 182.

64. Where the verdict is clearly contrary to evidence, the appellate court may reverse the judgment on that account. *Acquital* v. *Crowell*, 1 Cal. 193.

65. A verdict will not be disturbed unless it clearly appears to be erroneous, and if no evidence be submitted in the statement for the examination of the appellate court, the correctness of the verdict will not be doubted. *Folsom* v. *Root*, 1 Cal. 376.

66. The verdict of a jury will not be disturbed because the weight of the testimony seems to be against it. *Brown* v. *O'Conner*, 1 Cal. 44.

67. The appellate court will decline to review the facts of the case, unless an assignment of errors shows that the court below refused an application for a new trial, made on the ground that the verdict was contrary to evidence, and that only as an appeal from the refusal to grant a new trial. *Smith* v. *Phelps*, 2 Cal. 121; *Griswold* v. *Sharpe*, 2 Cal. 23; *Brown* v. *Graves*, 2 Cal. 119; *Ingraham* v. *Gildermeester*, 2 Cal. 484; *Whitman* v. *Sutter*, 3 Cal. 179; *Brown* v. *Tolles*, 7 Cal. 399; *Garwood* v. *Simpson*, 8 Cal. 108; *Marziou*

v. *Pioche*, 8 Cal. 537; *Liening* v. *Gould*, 13 Cal. 599; *Duff* v. *Fisher*, 15 Cal. 380.

68. Although the question of fraudulent intent is made a question of fact in all cases, yet, wherever the law declares that certain indicia are conclusive evidence of fraud, a verdict against such conclusions should be, in all cases, set aside; but where the facts are merely presumptions, the jury may find against such presumptions. *Billings* v. *Billings*, 2 Cal. 113; *Chenery* v. *Palmer*, 6 Cal. 122.

69. Where there is proof of damages, the amount is simply a question of fact within the province of the jury. The appellate court will not examine the proofs or declare that the evidence was insufficient to justify the verdict. *Bartlett* v. *Hogden*, 3 Cal. 58.

70. Where the verdict of the jury is clearly against the evidence a new trial will be awarded. *Bagley* v. *Eaton*, 8 Cal. 164; *Kimball* v. *Gearhart*, 12 Cal. 48; *Easterling* v. *Power*, 12 Cal. 89.

71. A verdict will not be disturbed if there is any evidence to support it. *Escolle* v. *Merle*, 9 Cal. 95.

72. Whenever facts are not expressly stated which are so essential to a recovery that without proof of them on the trial the verdict could not have been rendered under the direction of the court, there the want of the express statement is cured by the verdict, provided the complaint contains terms sufficiently general to comprehend the facts in fair and reasonable statement. *Garner* v. *Marshall*, 9 Cal. 269.

73. To justify an interference with the verdict of the jury in a criminal action, there must be an absence of evidence against the prisoner, or a decided preponderance of evidence in his favor. *People* v. *Ah Loy*, 10 Cal. 301.

74. To set aside the verdict, it must be clearly against the evidence. *Williams* v. *Covillaud*, 10 Cal. 426.

75. Where, in an action against a steamer for setting fire to plaintiff's fence, the jury was instructed, among other things, to find specially as to the negligence of the captain or crew of the steamer, and they found, generally, for plaintiff, four hundred dollars damages; and also, that the steamer's spark-catcher was not sufficient to prevent the sparks from communicating with the shore and endangering property, the verdict was held good in the absence of any objection at the time of its rendition, that it was not responsive to the special direction. *Algier* v. *Steamer Maria*, 14 Cal. 170.

76. Probably the finding, apart from the general verdict, was a finding of negligence, for an insufficient spark-catcher is hardly distinguishable from none at all, and this is proof of negligence. *Ib.* 171.

77. There being some proof of negligence, the supreme court will not review the verdict. *Algier* v. *Steamer Maria*, 14 Cal. 171; *Hull* v. *Sacramento Valley R. R. Co.*, 14 Cal. 389.

78. Where the motion for new trial, though made, does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict. *Myers* v. *Casey*, 14 Cal. 543.

79. Where a verdict is supported by any evidence at all, we will not review an order of the court of original jurisdiction refusing a new trial, unless the order is manifestly an abuse of the legal discretion of the court. *Burnett* v. *Whitesides*, 15 Cal. 36; *People* v. *Wyman*, 15 Cal. 75.

80. Where there are separate defenses, each of which is sufficient to defeat the action, and these defenses are submitted to the jury, with evidence in support of each, and the verdict is general for the defendants, it cannot be set aside if it be right as to any one issue, though wrong as to all the others. *Kidd* v. *Laird*, 15 Cal. 182.

81. But the fact or title must be material and relevant, must be distinctly in issue; must be tried by the jury, and constitute the base of the verdict, and unless specially found, must have been necessarily passed upon by the jury. *Ib.*

82. The court, whether sitting in equity or on trial of a common law action, may, of its own motion, set aside the verdict of a jury when it is clearly and palpably against the evidence, but when the court is satisfied with the verdict, the parties can only question its correctness by following the course pointed out by the statute. *Duff* v. *Fisher*, 15 Cal. 380.

83. On motion for new trial, on the sole ground that the verdict is not sustained by the evidence, the court below, in passing on the motion, cannot disregard any portion of the evidence before the jury. The question as to the competency of the evi-

dence cannot be raised on such a motion. *Mc Cloud* v. *O'Neal*, 1 Cal. 397.

84. A verdict obtained upon incompetent evidence may be set aside; but this cannot be done if the evidence were admitted without objection, nor can it be done upon the ground that effect was given to the evidence by the jury, even if objected to. *Ib.*

85. In such cases, that which vitiates the verdict. is the error of the court in admitting the evidence, and if the party seeking to set aside the verdict be not in a position to take advantage of this error, he cannot object that the evidence was improperly admitted. *Ib.*

See EVIDENCE.

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6. *For Improper Evidence.*

86. Unless the improper testimony could have had no influence upon the verdict, the presumption is that it did have some weight with the jury, and a new trial should be granted. *Santillan* v. *Moses*, 1 Cal. 93.

87. A verdict will be set aside and a new trial granted if improper evidence went to the jury, and the court cannot clearly see that it had no effect or weight with the jury. *Mateer* v. *Brown*, 1 Cal. 224.

88. The rejection of proper, or the admission of improper evidence, if it could in no way materially affect the verdict, will not be cause to set aside the same. *Persse* v. *Cole*, 1 Cal. 370.

89. The admission of improper testimony is no ground for disturbing a verdict where it is evident by the verdict itself that no injury was done thereby to the party objecting to its admission. *Priest* v. *Union Canal Co.*, 6 Cal. 171.

III. ON CONFLICTING EVIDENCE.

90. The finding of a jury or court, deciding upon the weight of testimony, will not be reviewed on appeal unless such finding be impeached for fraud, misconduct, mistake or improper influences. *Payne* v. *Jacobs*, 1 Cal. 41.

91. The verdict of a jury should not be disturbed when rendered upon a question of fact, where the evidence is conflicting, and where no rule of law appears to have been violated. *Gunter v. Sanchez*, 1 Cal. 49; *Johnson* v. *Pendleton*, 1 Cal. 133; *Hoppe* v. *Robb*, 1 Cal. 373; *Vogan* v. *Barrier*, 1 Cal. 187; *Dwinelle* v. *Henriquez*, 1 Cal. 389; *Davis* v. *Smith*, 2 Cal. 423, 476; *Brown* v. *O'Conner*, 1 Cal. 421; *Griswold* v. *Sharpe*, 2 Cal. 23; *Taylor* v. *McKinley*, 4 Cal. 104; *Duell* v. *Bear River and Auburn W. & M. Co.*, 5 Cal. 86; *McHenry* v. *Moore*, 5 Cal. 93; *Ritchie* v. *Bradshaw*, 5 Cal. 229; *Pickett* v. *Sutter*, 5 Cal. 413; *Conroy v. Flint*, 5 Cal. 329; *Adams* v. *Pugh*, 9 Cal. 17; *White* v. *Todd's Valley Water Co.*, 8 Cal. 444; *People* v. *Ah Ti*, 9 Cal. 17; *Williams* v. *Gregory*, 9 Cal. 77: *Scannell v. Strahle*, 9 Cal. 177; *Weddle* v. *Stark*, 10 Cal. 303; *Bensley* v. *Atwill*, 12 Cal. 240; *Ritter* v. *Stock*, 12 Cal. 402; *McGarrity* v. *Byington*, 12 Cal. 432; *Ortman* v. *Dixon*, 13 Cal. 40; *Visher* v. *Webster*, 13 Cal. 60; *Beckman* v. *McKay*, 14 Cal. 253; *McGarvey* v. *Little*, 15 Cal. 31; *Weaver* v. *Eureka Lake Co.*, 15 Cal. 273; *Stevens* v. *Irwin*, 15 Cal. 504; *Paul* v. *Silver*, 16 Cal. 75; *Baker* v. *Joseph*, 16 Cal. 180.

92. On a question of fraud, where there is conflicting evidence which was proper to have been submitted to a jury to pass upon, and the court granted a nonsuit, the appellate court in determining the question of nonsuit will presume that the fraud was not proven. *Ledley* v. *Hays*, 1 Cal. 161.

93. The finding of a referee is conclusive on the facts, where the evidence is conflicting. *Knowles* v. *Just*, 13 Cal. 621.

94. Where in a suit for conversion by an administrator, the complaint averred the facts necessary under the statute to maintain the action, and the answer denied the facts; but it is agreed by counsel that the proof is conflicting; and the court below instructed the jury, that if they believed from the evidence that defendant did receive the property mentioned in the complaint, belonging to the estate of G., deceased, and converted and appropriated it to his own use, and refused to deliver the same when demanded, etc., they will find for the plaintiff; and it is objected to upon appeal that this instruction was wrong, because it ignores all reference to the time

of the alienation by defendant, whether before or after the issuing of letters of administration upon the estate of deceased: held, that there being no statements of facts, the appellate court cannot tell whether there was any discrepancy in the proof as to the time of alienation, assuming that there was such alienation; and that in favor of the judgment, it must be presumed, unless there be direct evidence to the contrary, that the court did not err in giving the instruction in this form, for there may have been no controversy as to the time of alienation, if any was made, though there might have been conflict in the proof as to the fact of alienation, and this the court left to the jury. *Beckman* v. *McKay*, 14 Cal. 252.

95. In suit by an administrator against defendant, for conversion of the property of the estate, under the one hundred and eleventh section of the statute to regulate the settlement of estates, the proof as to the right, title or possession of plaintiff, and the taking or interference by defendant being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion. *Ib.*

96. Whether plaintiffs, who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch or flume, and appropriate the water for mining purposes, began their surveys, etc., and prosecuted their work to completion with due diligence as against parties attempting subsequently to appropriate the water, is a question for the jury, and their verdict on conflicting testimony will be conclusive. *Weaver* v. *Eureka Lake Co.*, 15 Cal. 274.

97. This court will not set aside the findings of the court below on conflicting proofs, especially in regard to the value of rents, or damage to property, both being of uncertain ascertainment. *Paul* v. *Silver*, 16 Cal. 75.

IV. Jurors impeaching their Verdict.

98. A new trial should not be granted on the affidavit of a juror made after the verdict, and for the purpose of moving for a new trial, that he had formed and expressed an opinion before the trial. *People* v. *Baker*, 1 Cal. 405.

99. A juror cannot be allowed to impeach his own verdict on account of his fellow jurors' misconduct. *Amsby* v. *Dickhouse*, 4 Cal. 103.

100. The affidavit of jurors will not be admitted to contradict their verdict. *Castro* v. *Gill*, 5 Cal. 42; *People* v. *Wyman*, 15 Cal. 75.

101. The affidavit of jurors will not be admitted to impeach their verdict, but will be allowed in order to substantiate it.* *Wilson* v. *Berryman*, 5 Cal. 46.

102. Where the affidavit of a juror is sworn to be correct by the sheriff, it may properly be treated as his original affidavit. *Ib.*

103. The affidavit of a juror, purging his conduct from the imputation of corruption or impropriety, will not be admitted, for he would not hesitate to conceal the same by perjury.* *People* v. *Backus*, 5 Cal. 276.

V. Amendment of a Verdict.

104. It is competent for the court to instruct the jury to amend their verdict as to form, not affecting the substance, and in such manner as to be unexceptionable in law. *Truebody* v. *Jacobson*, 2 Cal. 284.

105. The court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the cause, where the amendment in no respect changes the rights of parties. *Perkins* v. *Wilson*, 3 Cal. 139.

See Instructions, Juror, Jury.

VERIFICATION.

1. A party is not required to deny an endorsement under oath, and an endorsee

*The above conflicting decisions are both by C. J. Murray; but the former case is an obiter dictum, while in the latter case it received the attention of counsel and the bench, and the latter opinion may be relied on as the law.

cannot give the notes in evidence without proof of their endorsement. *Grogan* v. *Ruckle*, 1 Cal. 159; *Youngs* v. *Bell*, 4 Cal. 202.

2. It is no error to allow the defendant to verify his answer before trial, unless it in some way took the plaintiff by surprise, and this must be shown. *Angier* v. *Masterson*, 6 Cal. 62.

3. The objection to the want of verification to the declaration should have been made either before answer or with the answer. It comes too late after answer. *Greenfield* v. *Steamer Gunnell*, 6 Cal. 68.

4. When the complaint is verified, the answer shall contain a specific denial of each allegation controverted by defendant, or a denial thereof according to his information and belief. Every material allegation which is not so denied shall, for the purposes of the action, be taken as true. *Anderson* v. *Parker*, 6 Cal. 200; *Swartz* v. *Hazlett*, 8 Cal. 126; *Dewey* v. *Bowman*, 8 Cal. 149.

5. By verification of the complaint, the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes, by requiring a sworn answer. *Brooks* v. *Chilton*, 6 Cal. 642.

6. Where a complaint is verified, and there is no denial either of the ownership of the house during the period stated or of the occupancy of the premises by the defendant, there was in fact no denial of the amount claimed for the use and occupation of the premises. *Osborn* v. *Hendrickson*, 8 Cal. 32.

7. The object of verifying a complaint is to avoid the necessity and expense of producing proof to sustain the allegations of the complaint, in cases where the plaintiff would swear they were true and the defendant would not deny the truth of the alleged facts under oath. *Dewey* v. *Bowman*, 8 Cal. 149; *Thompson* v. *Lee*, 8 Cal. 279.

8. It is truly painful to witness the reckless ease with which defendants, in too many cases, make "general and specific" denials, under oath, of "each and every allegation of the complaint," when it is clear that some of the material allegations of the complaint would never have been separately denied. *Dewey* v. *Bowman*, 8 Cal. 150.

9. If the facts in the complaint alleged are presumptively within the knowledge of the defendant, he must answer positively, and a denial upon information and belief will be treated as an evasion. If the facts alleged in the complaint are not personally within the knowledge of the defendant, he must answer according to his information. *Curtis* v. *Richards*, 9 Cal. 38.

10. In no case can an allegation of the complaint be controverted by a denial of sufficient knowledge or information upon the subject to form a belief. *Ib.*

11. There are but two forms in which a defendant can controvert the allegations of a verified complaint so as to raise an issue: first, positively, when the facts are within his own personal knowledge; and second, upon information and belief, when the facts are not within his own personal knowledge. *Curtis* v. *Richards*, 9 Cal. 38; *Humphreys* v. *McCall*, 9 Cal. 62; *San Francisco Gas Co.* v. *City of San Francisco*, 9 Cal. 474; *Stewart* v. *Street*, 10 Cal. 378; *Ord* v. *Steamer Uncle Sam*, 13 Cal. 371.

12. Where both complaint and answer are verified, the denial in the answer of an allegation in the complaint, in the following terms, is not sufficient, viz: "And the said defendants deny for want of information to enable them to admit the sale and transfer of the said Georgia ditch to them, plaintiffs as alleged," &c. *Humphreys* v. *McCall*, 9 Cal. 62.

13. An answer, unaccompanied by a required verification, may be stricken out, and judgment ordered for plaintiff as upon a default. *Drum* v. *Whiting*, 9 Cal. 423.

14. The language of the statute is imperative, and makes only one exception in which the verification of an answer may be omitted when the complaint is duly verified, and that is when the admission of the truth of the complaint might subject the party to a prosecution for a felony. *Ib.*

15. Inability of counsel to obtain defendant's verification in time, may be good ground for an extension of time to answer, but cannot avail in resisting a motion to strike out, and for judgment after the answer is filed. *Ib.*

16. The statute imposes upon the defendant, if a natural person—and if a corporation, upon its officers and agents—the duty of acquiring the requisite knowledge or information respecting the matters alleged in the complaint, to enable them to answer in the proper form. *San Fran-*

cisco Gas Co. v. *City of San Francisco*, 9 Cal. 466.

17. An answer is fatally defective in not denying any of the allegations, either positively or according to information and belief, the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. *Ib.*

18. To a complaint verified the defendant filed a copy of the original verified answer by mistake; parties took depositions under the pleading and subsequently went to trial. After the close of the plaintiff's evidence his counsel then, for the first time, brought the mistake to the notice of the court by moving for judgment by default, which motion the court sustained, and refused to allow defendant then to verify his answer: held, that the court erred, and should have allowed the defendant to verify his answer. *Arrington* v. *Tupper*, 10 Cal. 464.

19. A copy of the note sued on being attached to and made part of the complaint, the answer not verified, admits the genuineness and due execution of the note, and entitles the plaintiff to judgment. *Horn* v. *Volcano Water Co.*, 13 Cal. 69.

20. In a verified answer an evasion of the controlling fact in issue is a strong circumstance against the defendant. *Baker* v. *Baker*, 13 Cal. 98.

21. Where the pleadings are verified, every matter of defense not directly responsive to the allegations of the complaint must be set up in the answer. *Terry* v. *Sickles*, 13 Cal. 430.

22. In an action upon an account stated, evidence that the items of the account are overcharged is not admissible, the complaint being verified, and the answer not averring fraud or mistake in the accounting. *Ib.*

23. A verification to an answer before a county recorder is good under the statute. *Pfeiffer* v. *Rhein*, 13 Cal. 648.

24. An allegation in a verified complaint that "defendants wrongfully and unlawfully entered upon and dispossessed" plaintiffs, is not sufficiently denied by a denial that "defendants wrongfully and unlawfully entered and dispossessed" plaintiffs, because such answer admits entry and ouster. *Busenius* v. *Coffee*, 14 Cal. 92.

25. A sworn answer must be consistent in itself, and must not deny in one sentence what it admits to be true in the next. *Hensley* v. *Tartar*, 14 Cal. 509.

26. Where a complaint is verified, an answer denying "generally and specifically each and every allegation in the complaint, the same as if said allegations were herein recapitulated," and also denying each allegation in the same form, with certain qualifications and exceptions, does not raise an issue upon any fact stated in the complaint. *Ib.*

27. In equity, the general denials made by traversing literally and conjunctively the statements of a sworn bill are not legitimate for the purpose of putting in issue specific allegations, for in this way a party may deny the entire charges in form as stated against him, in consistency with admitting the truth of the specific charge, or even the substantial fact. *Blankman* v. *Vallejo*, 15 Cal. 644.

28. The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion and to require a denial of every specific averment in a sworn bill in substance and in spirit, and not merely a denial of its literal truth, and whenever the defendant fails to make such denial he admits the averment. *Ib.*

VESSELS.

I. Actions against Vessels.

1. *For Breach of Contract.*

1. An action brought by husband and wife against a steamer for breach of a contract to carry the wife to New York via Nicaragua, the alleged breach consisting in carrying the wife to Panama, and causing her detention there, and consequent illness and other injuries, though based on a contract sounds in tort, and the wife is a proper and necessary party plaintiff. *Warner* v. *Steamer Uncle Sam*, 9 Cal. 729; *Ord* v. *Steamer Uncle Sam*, 13 Cal. 372.

2. Where in an action to recover damages occasioned to the plaintiff from his detention by the defendants as common carriers, a witness was permitted to give his estimate of the value of plaintiff's services per day, which he placed as high as one hundred dollars, and stated as ground for his opinion that the plaintiff was a speculator, possessed of large property, money invested in stocks, rents and other sources of income, and frequently made from one to five hundred dollars per day: held, that the testimony was inadmissible. *Hastings* v. *Steamer Uncle Sam*, 10 Cal. 341.

3. A contract for the transportation of passengers from San Francisco to New York is an entirety, whether the entire voyage is to be performed in one vessel or not. *Ord* v. *Steamer Uncle Sam*, 13 Cal. 371.

See COMMON CARRIERS.

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2. *On Statute Penalties.*

4. Where a statute required the owners or consignees of every vessel entering a harbor to give a several bond to the State in a penalty of two hundred dollars for every passenger and member of the crew on board of such vessel, but no penalty was given by the statute for a neglect to give the bond, and an action was brought to recover two hundred dollars for each passenger as a penalty for neglecting to give such a bond: held, that the action could not be sustained. *Board of Health* v. *Pacific Mail S. S. Co.*, 1 Cal. 198.

5. If, in such case, any action at all can be brought, it must be to recover such damages as the plaintiffs can show they have actually sustained by reason of the refusal to give the bond. *Ib.*

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3. *By Foreign Seamen.*

6. A British seaman, on board a British vessel, of which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seaman, sue for and recover his wages in a State court. *Pugh* v. *Gillam*, 1 Cal. 485.

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4. *Attachment against Vessels.*

7. An act of the legislature authorizing the issuing of attachments against boats and vessels "used in navigating the waters of the State," does not apply to vessels belonging to a foreign port, and which visit one of the harbors of this State for a few days only.* *Souter* v. *Ship Sea Witch*, 1 Cal. 163; *Ray* v. *Bark Henry Harbeck*, 1 Cal. 451.

8. Where a bond is given for a release of a vessel attached by virtue of a statute which does not apply to vessels of that peculiar class: held, that the principol and sureties were not liable on the bond. *McQueen* v. *Ship Russell*, 1 Cal. 165.

9. When the bond is given the vessel shall be released, leaving the action to proceed in the same manner against the vessel as if the vessel is not liable; the giving the bond cannot vest a jurisdiction over the subject matter. *Ib.* 166.

10. The rule that requires seizure of the thing to give jurisdiction in actions in rem, is altered by our statute. Service on a person standing in particular relation to the thing, confers jurisdiction on the court from which process issues. *Averill* v. *Steamer Hartford*, 2 Cal. 309; *Meiggs* v. *Scannell*, 8 Cal. 408; *Fisher* v. *White*, 8 Cal. 422.

11. As soon as a vessel is seized by a court of admiralty, a lien attaches in favor of the party at whose instance the seizure is made. *Meiggs* v. *Scannell*, 7 Cal. 408.

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* These cases were decided under the code of 1850. The code of 1851 permits these attachments to issue.

12. If it was the intention of the legislature to provide that a lien should only be acquired by attachment, this would virtually be denying a right to creditors for small sums. It would be almost impossible for a mechanic or merchant of small capital or credit, who had a claim of a few hundred dollars against one of our large steamers or some sea-going vessel, to give the necessary bonds to detain her until his suit could be determined, and in the meantime she might be run off and sold free of all such debts or incumbrances. *Ib.*

See ATTACHMENT.

II. OWNERSHIP OF VESSELS.

13. Under proceedings in admiralty in rem, the interest of one part owner cannot be sold to satisfy a demand due from the vessel itself. *Loring* v. *Illsley*, 1 Cal. 29.

14. The voluntary transfer of a minority interest in a ship does not confer upon the purchaser any more extensive control than the vendor himself enjoyed; nor can a forced sale under execution have a greater effect. *Ib.* 31.

15. The register of a vessel is admissible in evidence for the purpose of proving who are the owners of a vessel. *Brooks* v. *Minturn*, 1 Cal. 482.

16. The owner of a ship chartered by and in the name of his agent may, although he is not mentioned in the charter party, be shown by extrinsic evidence to be the principal in the contract, and will be allowed to avail himself of its provisions. *Ib.*

17. Where the master of a vessel was in possession, and the record did not disclose any other owner, the admissions of the master were admissible in evidence, with the same effect as if the suit had been against the master himself. *Bailey* v. *Steamer New World*, 2 Cal. 273.

18. The rule of law, that possession of personal property is prima facie evidence of ownership, is uniform in its application. The question of the ownership of a vessel forms no exception to the rule. *Ib.*

19. The complaint showed that the vessel was in 1855 the property of the plaintiffs; that they appeared and defended the action against the vessel as owners, and there is nothing in the record to raise a presumption that they are not now the owners of it, and a judgment against them will be satisfied out of the vessel. *Russell* v. *Conway*, 11 Cal. 101.

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1. *Registry.*

20. The register of a vessel is admissible in favor of the person claiming to be the owner, in connection with other evidence tending to establish the ownership. *Brooks* v. *Minturn*, 1 Cal. 482.

21. The rules of action prescribed in the shipping acts of congress are very strict, and everything necessary to constitute a "vessel of the United States," is required to appear affirmatively, and for this purpose it requires the oath of the interested party. *Davidson* v. *Gorham*, 6 Cal. 346.

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2. *Lien.*

22. A part owner of a vessel has no lien on the shares of the other part owners, for his advances and disbursements. *Sterling* v. *Hanson*, 1 Cal. 480.

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3. *Mortgage.*

23. In an order to maintain that a mortgage on a vessel is void as to creditors, because not properly registered, it is absolutely necessary to show that the vessel in controversy was a "vessel of the United States," within the meaning of the registration acts of congress, at the time of her seizure; and to do this it is necessary to show affirmatively every incident which entitles her to that privilege, or to show as much as would under those acts entitle her to a new register. *Davidson* v. *Gorham*, 6 Cal. 347.

24. Where a new owner under such sale mortgaged the vessel still at sea, neither the bill of sale nor the mortgage being registered at the port of departure where the vessel was registered: held, that the mortgage was good against attaching creditors of the new owner, who levied immediately on her arrival, neither

party taking the requisite steps to obtain a new registry; as the vessel had lost her national character, and was not therefore subject to the provisions of the law requiring the registry of sales and mortgages. *Ib.* 348.

25. To make a mortgage valid on a sea-going vessel, the act of congress requires it to be recorded, while our statute requires actual possession to be taken of the property itself. The entire right of the party to the same description of property depends in the contemplation of each act solely and exclusively upon that which it alone prescribes. *Mitchell* v. *Steelman*, 8 Cal. 370.

26. Where A, the owner of a sea-going vessel, executes to B a mortgage thereon, which is recorded in the custom house of the home port; B commences suit to foreclose the mortgage, and makes C a party defendant thereto, on the ground that he has purchased the vessel subject to the lien of plaintiff's mortgage; C in his defense avers that the mortgage was void under our statute of frauds, and that he now holds the vessel discharged from the same: held, that the mortgage was a valid lien, and that the record of the mortgage was sufficient notice thereof to C. *Ib.*

27. To require a mortgagee in all cases to take possession of the vessel is a harsh provision, and must operate greatly in restraint of commerce. How the master of a vessel who is a part owner could execute a mortgage, and still remain on board, under the stringent provisions of our statute, it is difficult to see. *Ib.* 374.

See MORTGAGE.

4. *Sale.*

28. A sale of a vessel of the United States at sea, to a foreigner, forfeits her national character, unless the new owner pursues all the requisites of the law to obtain a new registry within five days after her arrival at a port of the United States. *Davidson* v. *Gorham*, 6 Cal. 347.

29. To authorize the captain of a vessel to pledge or sell the property of his owners for necessaries, certain facts must be established. The vessel must be in a foreign port, the voyage must be unfinished, the pledge of sale must be indispensable to enable the ship to complete her voyage. *Marziou* v. *Pioche*, 8 Cal. 534.

30. Where a sale of a vessel is made part cash and the balance of the purchase money to be paid upon delivery by the vendor to the vendee of a good title and register of a vessel, to recover the balance the vendor must show an offer on his part to comply with the agreement. *Fowler* v. *Fisk*, 12 Cal. 112.

5. *Delivery.*

31. Where a contract stipulates for the delivery of a vessel, but designates no particular place for such delivery: held, that a notice of a readiness to deliver must be treated under the contract as an actual delivery. *Albretson* v. *Hooker*, 5 Cal. 178.

III. DAMAGE CAUSED BY A VESSEL.

32. The declarations of a master of a steamboat, whilst running the river, respecting fire communicating from the chimneys of the boat to the crops of grain on the banks of the river, by which the crop was consumed, were admissible in evidence to establish the liability of the owners, in an action against them to recover damages for the destruction of the crop. *Gerke* v. *California Steam Navigation Co.*, 9 Cal. 255.

33. Where in an action against a steamer for setting fire to plaintiff's fence, the jury was instructed among other things to find specially as to the negligence of the captain and crew of the steamer, and they found generally for plaintiff, four hundred dollars damages; and also that the steamer's spark-catcher was not sufficient to prevent the sparks from communicating with the shore and endangering property, the verdict was held good, in the absence of any objection at the time of its rendition that it was not responsive to the special direction. *Algier* v. *Steamer Maria*, 14 Cal. 170.

See DAMAGE.

IV. Master of a Vessel.

34. The conduct and management of a ship are always entrusted to a master, whether he has or has not a partial property in it, and in either case he is the confidential servant or agent of the owners at large. *Loring* v. *Illsley*, 1 Cal. 31.

35. The master of a vessel, as such, has no interest in it which can be the subject of levy and sale, under execution. He is but a naked agent, and has no substantial interest in the property which can be levied upon and sold. *Ib.*

36. If a master of a vessel be a part owner, his interest in the vessel may be levied on and sold, but his agency as master will be in no wise affected. *Ib.*

37. The responsibility of taking a position or berth for a vessel in port rests upon the master of the vessel or the harbor master, therefore the owner is not exempt from liability for injuries committed by taking an improper berth, although such berth may have been selected by the pilot who brought the vessel into port. *Griswold* v. *Sharpe*, 2 Cal. 24.

38. Where the master of a vessel was in possession, and the record did not disclose any other owner, the admissions of the master were admissible in evidence with the same effect as if the suit had been against the master himself. *Bailey* v. *Steamer New World*, 2 Cal. 373.

39. The captain of a vessel drew on the owner for six hundred dollars to defray the expenses of the first mate, who was ill. In an action against the owner by the captain for wages, the owner endeavored to set off the draft: held, that this could not be done without producing the draft or showing payment of it. *Wakeman* v. *Vanderbilt*, 3 Cal. 382.

40. Where the defendant, a master of a vessel, received certain goods of plaintiff to be delivered at a certain place, which he failed to do, and in the action brought thereupon he offered to prove that the goods belonged to a third party, who had forbidden such delivery, and that plaintiff had obtained possession of the goods by fraud: held, that he was entitled to prove such facts. *Hayden* v. *Davis*, 9 Cal. 574.

See Admiralty, Bill of Lading, Charter Party, Collision, Towing.

Veto.

1. The constitution provides that if any bill presented to the governor, having passed both houses of the legislature, shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall become a law in like manner as if he had signed it, unless the legislature by adjournment prevent such return; and the ten days must be computed by excluding the day on which the bill is presented to the governor. *Price* v. *Whitman*, 8 Cal. 416; overruling *People* v. *Whitman*, 6 Cal. 660.

Votes.

1. When the judges of election have administered the oath to a voter, the right to vote is concluded, and it is error to deny it. *People* v. *Gordon*, 5 Cal. 236.

2. The fact that the candidate receiving the highest number of votes at an election by the people is ineligible, does not give the office to the next highest on the list. *Saunders* v. *Haynes*, 13 Cal. 153.

3. In a proceeding to contest the election of defendant as district judge, the ineligibility of the candidate receiving the highest number of votes, the defendant being next on the list, is no defense, because this matter, if true, could not protect the incumbent from the consequences of an unauthorized possession of the office. *Ib.*

4. The mere fact that a man is a soldier in the United States army does not disqualify him from voting in this State. But he cannot vote unless he has been a citizen of the State and of the county in which he votes for the constitutional period. *People* v. *Riley*, 15 Cal. 49.

5. And a mere residence or sojourn in the county as a soldier does not make him a citizen, or prove him to be such. The rule, as fixed by the constitution, is, that the fact of such sojourn or residence as a soldier neither creates nor destroys citizenship— leaving the political status of the soldier where it was before. *Ib.*

6. Where the right of a United States soldier to vote is contested, the burden of proof is upon the contestant. *Ib.* 50.

7. A surviving partner has a right to vote, at an election for officers of a corporation formed under the general incorporation act of this State of 1853, the stock in his hands as assets of the partnership— the business of the firm being unsettled. *People* v. *Hill*, 16 Cal. 118.

8. The fact that a portion of the stock voted by such surviving partner stood upon the books of the corporation, at the time of the election, in the name of the deceased partner alone, does not affect the right to vote, if in fact the stock belonged to the partnership. *Ib.* 119.

WAGES.

1. In an action against a common carrier for nonperformance of his contract to carry a passenger, remote and contingent damages cannot be recovered: so held in a case where the plaintiff, through a violation of the agreement of defendants, was detained at New Orleans and at Panama, on his way to California, an unreasonable length of time, and the court charged the jury that the measure of damages would be the wages at the then rates in San Francisco during the period of such detention. *Yonge* v. *Pacific Mail S. S. Co.*, 1 Cal. 354.

2. Semble, that evidence showing that the plaintiff was a good book-keeper was proper to be submitted to the jury to enable them to form an estimate of the damages which the plaintiff had probably sustained. *Ib.*

3. A British seaman on board of a British vessel, of which a British subject is master, may, when discharged by the master in a port in the United States, without any fault on the part of the seaman, sue for and recover wages in a State court. *Pugh* v. *Gillam*, 1 Cal. 486.

4. Where a person agrees to work for a certain period at a certain price, or to perform certain services for a fixed amount, he cannot break off at his own pleasure and maintain an action for the work so far as he has gone; performance is a condition precedent to payment. *Hutchinson* v. *Wetmore*, 2 Cal. 312.

5. The plaintiff introduced two witnesses to prove the value of his services in going twice to Europe to negotiate the purchase of an estate, etc.; but it was not shown that he undertook these voyages at the request of defendant, or in what capacity he went: held, that the court erred in admitting the testimony, as the question was hypothetical, and assumed a state of facts not in proof. *Dopman* v. *Hoberlin*, 5 Cal. 414.

6. Where a hired person continues in employment after the expiration of the contract, and without any new contract, the fair presumption is that both parties understood that the same salary was to be paid, and it is therefore error in a suit by the servant to allow him to recover upon a quantum meruit. *Nicholson* v. *Patchin*, 5 Cal. 475.

7. A witness in an action for a disputed mining claim, who was in employ of the party in possession, at fixed wages to be paid, however, from the proceeds of the claim, is not incompetent when his wages are not dependent upon the sufficiency of such proceeds. *Live Yankee Co.* v. *Oregon Co.*, 7 Cal. 42.

8. Where the plaintiff was the stepmother of the defendants by whom she was supported, and for whom she performed domestic services, for the value of which she sued the defendants; held, that as she stood in "loco parentis" to defendants, the law does not imply any contract to pay for such services. *Murdock* v. *Murdock*, 7 Cal. 513.

9. When the father promises his infant child a certain reward for doing that which he was already bound to perform, the agreement has no consideration whereon to rest. *Swartz* v. *Hazlett*, 8 Cal. 123.

10. The principle upon which the infant is allowed to collect his wages is that of agency. The infant can be his father's agent, and whether he is so or not is a question of fact, like any other question of agency, which may be proven by either direct or circumstantial testimony. *Ib.* 124.

11. Where a parent executes to his infant son a conveyance of property, in consideration of services performed, it must be considered as a voluntary conveyance, without legal consideration, as he is not

legally bound to pay for his son's services. *Ib.* 125.

12. The salaries of teachers of the city and county of San Francisco, under the consolidation act, should be paid in the same manner as other claims against the treasury. *Knox* v. *Woods*, 8 Cal. 546.

13. Where the owner of a mining claim contracts verbally with J. for the working thereof, and agrees to pay him a certain sum out of the proceeds of the mine, and J. goes into possession thereof, and while he is working it the owner sells it to a third party, who takes without notice of J's contract: held, that his claim is not subject or liable to J's contract. *Jenkins* v. *Redding*, 8 Cal. 603.

14. Where a party employed received a regular specific monthly salary for his services, the presumption of law is that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary, and to this presumption he must show an express agreement for this extra pay, otherwise he cannot recover. *Cany* v. *Halleck*, 9 Cal. 201.

15. The statute of April 4th, 1857, fixing the compensation of the county clerk of the county of Placer at $3000 per annum, was intended in lieu of all fees for services rendered. *Mitchell* v. *Stoner*, 9 Cal. 293.

16. A sheriff cannot maintain an action against a county for compensation for "taking care of the court house, and keeping and guarding the jail of the county during his incumbency of the office of sheriff." The law fixes his compensation for the performance of such official duty. *Stockton* v. *Shasta County*, 11 Cal. 114.

17. The board of supervisors of a county possesses no power to allow the county auditor compensation for the issuance and calculation of warrants drawn on the county treasurer. *People* v. *Supervisors of El Dorado County*, 11 Cal. 174.

18. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich* v. *Emeric*, 12 Cal. 181.

19. Where the principal of a line of stages, by letter to one acting as his agent in such business, wrote "you will do better by getting new drivers and agents, and horses," and such agent employed a sub-agent, and subsequently the principal was informed of such employment and made no objection, in an action for the wages of the sub-agent: held, that the facts were sufficient to authorize the jury to find the fact of authority in the agent to employ the plaintiff. *Mc Connell* v. *Mc Cormick*, 12 Cal. 143.

20. A district judge inducted into office with a commission from the governor, showing him to be entitled to it from a certain date, draws the salary annexed to the office from that date. *Turner* v. *Meloney*, 13 Cal. 623.

21. In suit to recover wages for half a year, under a contract to work a whole year, plaintiff having quit the employment of defendant, it requires slight evidence of assent or agreement to apportion the contract and allow plaintiff to recover. *Hogan* v. *Titlow*, 14 Cal. 256.

22. Some proof of a promise on the part of defendant to settle with plaintiff will sustain a verdict for him in such case. *Ib.*

23. In a suit by a female against two parties in a ranch, for services as servant to the firm, under an implied contract as on a quantum meruit, proof that plaintiff is the wife of one of defendants is good under the general issue, as showing that there was no implied contract to pay for the services. *Angulo* v. *Sunol*, 14 Cal. 402.

24. In a suit by a physician against a county, on a contract for his services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless it distinctly present the objection. *McDaniel* v. *Yuba County*, 14 Cal. 445.

25. The term "compensation" in section twenty-one, article four, of the constitution of this State, means the income of the office, not the profit over and above the necessary expenses of the office. *Searcy* v. *Grow*, 15 Cal. 122.

26. Under the Sacramento consolidation act of 1858, the treasurer of the city and county of Sacramento is entitled to receive for his official services only $3000 per annum. He is not entitled to the percentage allowed by the State to county treasurers for money paid by them into

the State treasury. This percentage belongs to the city and county of Sacramento. *City of Sacramento* v. *Bird*, 15 Cal. 295.

27. In a suit by a stockholder in a private corporation against the corporation, and four of the trustees, who owned stock sufficient to enable them to control the business of the company, for an account and settlement of its affairs, alleging fraud and mismanagement on the part of the trustees, the court below, by its decree, deprived one of said trustees of his salary as superintendent of the business of the corporation: held, that this was error; that, although such superintendent was also trustee and treasurer of the corporation, contrary to a positive provision of the by-laws; and although, in the management of the business of these offices, no attention had been paid to the by-laws and regulations of the corporation, yet, as no fraud was shown, and as the superintendent had faithfully performed his duty as such, he was entitled to his salary. *Neall* v. *Hill*, 16 Cal. 149.

28. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento has no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act, and its action in creating such office and raising such salaries may be reviewed on certiorari. *Robinson* v. *Supervisors of Sacramento County*, 16 Cal. 211.

WAGON ROAD.

1. The act of April 8th, 1855, providing for the construction of a wagon road to the Sierra Nevada mountains, and authorizing the board of commissioners to contract for the same at a price not exceeding three hundred thousand dollars, passed while the aggregate existing indebtedness of the State, without counting that incurred by the first legislature, exceeded three hundred thousand dollars, and it containing no provision for the submission of the question to the people, was unconstitutional and void. *People* v. *Johnson*, 6 Cal. 504.

WAIVER.

1. Where defendant moved for nonsuit, and afterwards introduced evidence supplying the defect in the plaintiff's testimony on which the motion for nonsuit was founded: held, that the defendant waived his motion, and could not insist upon it on appeal. *Ringgold* v. *Haven*, 1 Cal. 117; *Smith* v. *Compton*, 6 Cal. 26; *Winans* v. *Hardenbergh*, 8 Cal. 293; *Perkins* v. *Thornburgh*, 10 Cal. 190.

2. Where a demurrer to a complaint is put in and overruled, and the defendant then answers, the answer is a waiver of the demurrer.* *DeBoon* v. *Priestly*, 1 Cal. 206; *Pierce* v. *Minturn*, 1 Cal. 471; *Brooks* v. *Minturn*, 1 Cal. 481.

3. Where an order granting a new trial was made in the court below upon the payment of costs, and defendant paid the costs, and plaintiffs appealed from the order: held, that the acceptance of the costs was not a waiver of the right of appeal. *Tyson* v. *Wells*, 1 Cal. 379.

4. An express notice of nonpayment is equivalent to an admission that the note has been presented or need not be presented. *Matthey* v. *Galley*, 4 Cal. 63.

5. The mere act of filing an answer does not operate as an appearance at the trial, so as to prevent the waiver of the jury trial. *Zane* v. *Crowe*, 4 Cal. 113.

6. Proceedings having been transferred to a justice who had jurisdiction, by consent of parties, the appearance of defendant and his consent fixing the time of trial were a waiver of his right to be brought in by complaint and summons. *Cronise* v. *Carghill*, 4 Cal. 122.

7. An appearance by attorney at common law and by our statute amounts to an express waiver of service. *Suydam* v. *Pitcher*, 4 Cal. 281.

8. A waiver of the performance of a written contract under seal may be shown by parol, and this waiver excuses the performance. *Whiting* v. *Heslep*, 4 Cal. 330.

9. Where a defendant appears for the purpose of taking advantage of irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as

*These decisions were made when the code permitted appeals from an interlocutory order, which were restricted by the amendment of 1854. See note, p. 98.

to cure the defect. *Deidesheimer* v. *Brown*, 8 Cal. 340.

10. A failure to file a statement setting forth the grounds upon which a party intends to rely, on motion for a new trial, operates as a waiver of the rights to the motion. *Adams* v. *City of Oakland*, 8 Cal. 510; *Wing* v. *Owen*, 9 Cal. 247.

11. When the deposition of a witness is taken, objections to his competency must be taken at the time and not reserved till the trial, or they will be deemed waived. *Jones* v. *Love*, 9 Cal. 70.

12. On motion for a new trial, the filing of a counter statement is a waiver of objections to want of notice of the intention to move for a new trial. *Williams* v. *Gregory*, 9 Cal. 76.

13. The failure of the defendant to appear on the trial of replevin when the cause is called, is a waiver of a jury under the one hundred and seventy-ninth section of the code. *Waltham* v. *Carson*, 10 Cal. 180.

14. Where counsel in a cause pending in the supreme court stipulate to submit the case to the court on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation and insist upon points other than those mentioned in the stipulation. *Cahoon* v. *Levy*, 10 Cal. 216.

15. The supreme court will not examine errors assigned on appeal where, after the service of the motion of appeal, the parties stipulated that all errors in the record, referee's report, decree and judgment were waived. *Glotzback* v. *Foster*, 11 Cal. 37.

16. Where personal property is tortiously taken, the party aggrieved may waive the tort and sue in assumpsit for the value of the property. *Fratt* v. *Clark*, 12 Cal. 90.

17. The right to try particular cases in particular counties is a mere privilege which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place. *Watts* v. *White*, 13 Cal. 324; overruling *Vallejo* v. *Randall*, 5 Cal. 462.

18. The record of the proceedings in a justice's court in which judgment was rendered, must affirmatively show that the suit was brought in the proper township, or the proceedings are coram non judice and void; and the failure of defendant, after summons served to appear and object that suit was brought in the wrong township, is no waiver of the objection. *Lowe* v. *Alexander*, 15 Cal. 301.

19. Where a jury is waived, and the cause tried by the court, the court should find the facts, and not merely state the proofs. *Heredink* v. *Holton*, 16 Cal. 104.

20. A party having secured a mechanic's lien under the statute, does not forfeit or waive it by causing an attachment to be issued and levied upon property of the debtor to secure the same demand. The two remedies are cumulative, and both may be pursued at the same time. *Brennan* v. *Swazey*, 16 Cal. 142.

21. Demurrer to an indictment for perjury being sustained, the district attorney took no exception, but moved for and obtained an order submitting the case to another grand jury. Subsequently the people appealed from the order sustaining the demurrer: held, that the failure to except and taking this order was an acquiescence in the judgment on demurrer, and a waiver of any right to appeal. *People* v. *Wooster*, 16 Cal. 435.

WAREHOUSE.

1. Warehousemen who give their receipt for goods on storage are estopped from setting up a want of segregation of the goods receipted for from other goods, in an action against them by the holder of the receipt for the conversion of the goods by a seizure in an action against a vendor of plaintiff. *Goodwin* v. *Scannell*, 6 Cal. 543.

2. And this, although the warehousemen are attaching creditors, and although the sheriff making the seizure was not liable by reason of there being no segregation. *Ib.*

3. When the plaintiff took a mortgage on one thousand sacks of flour, and took the warehouseman's receipt therefor, and subsequently requested the warehouseman to segregate this flour from a large quantity belonging to the mortgagor, and the warehouseman accordingly put plaintiff's

mark on a pile of eleven hundred and ninety-six sacks of the mortgagor, standing separate from the rest: held, that it was a good segregation. *Squires* v. *Payne*, 6 Cal. 659.

4. This delivery destroyed the privity between the warehouseman and the mortgagor, and made the former agent of the mortgagee alone, with whom he might adjust for the excess. *Ib.*

5. Where the plaintiff bought eight hundred sacks of flour, on storage in a warehouse, which stood therein as a separate pile, the number of sacks of which was ascertained by counting the outside rows, and the number in the pile marked on one of the sacks, and it was thus delivered to the purchaser, who permitted it to remain in the same place, where it was several days afterwards attached as the property of the vendor: held, that the delivery was sufficient and the sale valid. *Cartwright* v. *Phœnix*, 7 Cal. 282.

6. A sale of merchandise by bill of sale, the goods remaining in the possession of the vendors as warehousemen, at a regular charge, and their receipt given for the goods on storage, the vendors doing business as commission merchants, and sometimes receiving goods on storage, is void as to the creditors of the vendors. *Stewart* v. *Scannell*, 8 Cal. 83.

7. Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on a warehouseman which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on his books charging the vendors and crediting the purchasers with their respective lots: held, that there was a sufficient delivery of possession, without a separation of the various lots. *Horr* v. *Barker*, 8 Cal. 607.

8. Where the vendor only sells a part of goods on storage, those sold, if all together and of the same mark, must be separated from a larger mass in order to change the possession; but when all of the goods of the vendor, in the hands of a third party, are sold, the change of possession is complete by delivery of the order, taking a new receipt and entry of the transactions on the books of the warehouseman. *Ib.*

9. A delivery of a warehouse receipt, stating that the goods named therein are deliverable on return of the receipt, is sufficient prima facie to pass the title. There is no substantial difference, in this respect, between a warehouse receipt and a bill of lading. *Ib.* 8 Cal. 614; 11 Cal. 403.

10. Where the defendants, warehousemen, deliver wheat to third persons who bought from a broker for his own debt, on the ground that they held the storage receipt of defendants to one J., who had loaned money to E. & H. on the wheat as collateral, and had endorsed the receipt "deliver to bearer or E. & H.," the defendants knowing at the time of said delivery that E. & H. claimed the wheat as their property, they are liable to E. & H. for a commission. *Hanna* v. *Flint*, 14 Cal. 75.

11. Bill for an injunction to restrain defendants from taking possession of certain real estate—a warehouse and wharf. Complaint avers plaintiffs' title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business and their property be destroyed: held, that these allegations are insufficient to authorize an injunction—there being no averment of the insolvency of defendants, and the complaint not showing that there is no adequate remedy at law. *Tomlinson* v. *Rubio*, 16 Cal. 206.

12. In such case, forcible entry and detainer would be a speedy mode of regaining the possession, if taken by defendants, and for other damages the usual proceedings at law would suffice. That the premises are used in connection with the transportation business, which would be interrupted by the threatened trespass, is not alone a ground for equitable interference. *Ib.*

13. On trial for burglary, the court instructed the jury that, if they found from the evidence that defendant entered a cer-

tain warehouse in the night time, and took therefrom certain goods and chattels, he was guilty as charged: held, that the instruction was wrong, because it ignores the felonious intent of the entry, and the character of it. *People* v. *Jenkins*, 16 Cal. 431.

WARRANT OF ARREST.

See ARREST, CRIMES AND CRIMINAL LAW.

WARRANTS.

1. There is nothing in the act of 1855, creating boards of supervisors in the counties of the State, which entitles a warrant drawn on the fund for the current expenses during that year to a priority in payment over a warrant of the same class drawn the year before. *McCall* v. *Harris*, 6 Cal. 284.

2. A board of supervisors has no power to set apart a portion of the revenue of the county as a fund for current expenses. The order of payment of warrants is established by law and cannot be changed by the supervisors. *Laforge* v. *Magee*, 6 Cal. 285.

3. Where the right of a holder of county scrip to payment thereof had become fixed by presentation, there being money for such payment then in the treasury, a subsequent act of the legislature cannot intervene to divest rights already acquired. *Ib.* 650.

4. In the absence of an unexhausted specific appropriation to meet a warrant of the controller on the State treasurer, a warrant on the treasurer is absolutely void. *Butler* v. *Bates*, 7 Cal. 137.

5. Under the act of 1851, the county auditor can only draw warrants where the claim is audited by himself. This is a defect in the law which the court cannot remedy on the pretext of public convenience. *Draper* v. *Noteware*, 7 Cal. 278.

6. The revenue law of 1854 authorized the payment of a portion of taxes in controller's warrants. The act of 1855 and 1856 provide for the funding of the State debt and the collection of the revenue in cash, and forbade the treasurer to liquidate any of the debt except as therein provided: held, that the act of 1854, allowing payment in warrants, was therefore repealed. *Scofield* v. *White*, 7 Cal. 400.

7. The acceptance, by a collector of taxes, of a warrant, is not a liquidation of the debt, but a receipt of it by the State treasurer from the collector would be a liquidation, for which the treasurer would be responsible. *Ib.* 407.

8. The provisions of the act of April 27th, 1855, requiring all persons holding certain warrants upon the treasurer of Calaveras county to present the same for registry before a certain day, or be forever barred from enforcing the payment thereof, are therefore unconstitutional. *Robinson* v. *Magee*, 9 Cal. 85.

9. Where the account of a deputy assessor for $1,650 was audited and allowed by the board and ordered to be paid, the order being in the following words: "Ordered, the sum of four thousand one hundred and twenty-five dollars be paid out of the fund for current expenses to equal sixteen hundred and fifty dollars in cash, at the rate of forty cents on the dollar, October 29th, 1856," and in pursuance of such order the county auditor drew his warrant for $4,125 upon the treasurer and delivered it to the deputy assessor, who presented it to the treasurer, and by him it was endorsed and registered in its order of presentation among the legal warrants against the county: held, that the order was made without authority, and was void, and the fact that the market or cash value of county warrants was only forty per cent. of the nominal amount, and the object of the action of the board was to give that which was, at the time, an equivalent to cash, did not justify the action of the board. *Foster* v. *Coleman*, 10 Cal. 281.

10. A county may assign and transfer a warrant drawn in its favor by another county, on its treasurer, so as to invest the holder with the right to demand payment thereon. *Beals* v. *Evans*, 10 Cal. 460.

11. Payment may be demanded of the treasurer of Amador county by the holders of warrants issued in pursuance of that act, at any time when there are funds in the hands of the treasurer to meet the same, and a receipt and corresponding credit endorsed on the warrant, will be sufficient to protect the county and the officer making the payment. *Ib.* 461.

12. The board of supervisors of a county possesses no power to allow the county auditor compensation for the issuance and cancellation of warrants drawn on the county treasurer. *People* v. *Supervisors of El Dorado County*, 11 Cal. 174.

13. County warrants acquire no greater validity in the hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they may have been transferred, or in what faith they may have been taken. If illegal when issued, they are illegal for all time. *Ib.* 175.

14. The protection which attends the purchaser of negotiable paper before maturity, without notice of the illegality of its consideration, does not extend to like purchasers of county warrants. *Ib.*

15. The board of supervisors therefore has no power to direct and authorize the treasurer to pay warrants in violation of the provisions of the statute. *McDonald* v. *Maddux*, 11 Cal. 190.

16. Warrants drawn by the controller of State, delivered to the payees thereof, and by them indorsed in blank, were presented by the holders to the State treasurer, and on payment were delivered to him. They were afterwards stolen from the office of the treasurer. The warrants, on their face indicating a just and legal claim against the State, came into the hands of defendants, ignorant that they had been stolen. Defendants present them to the treasurer, and in lieu thereof, receive State bonds payable to bearer, under the funding act of 1857, and part with them. The State sues for the bonds or their value: held, that the action does not lie; that defendants having received the bonds bona fide, and without fraud, for warrants apparently good against the State, are not liable in this form of action. *State of California* v. *Wells*, 15 Cal. 341.

17. The mere reception of the bonds, though issued by mistake, does not render defendants liable. *Ib.* 342.

18. Bonds so issued are negotiable, and bind the State, in the hands of an innocent assignee. *Ib.*

19. The bonds, in this case, constituted a payment of the warrants; and if the rule that voluntary payments are not recoverable be not applicable, still the equity of the defendants is equal to that of plaintiff, and courts will not interfere. *Ib.* 343.

20. The warrants in this case, drawn by the controller and countersigned by the mayor of San Francisco, upon the treasurer, to pay for certain street improvements, will not support an action. They cannot be treated as bills of exchange or promissory notes, for they are drawn upon a particular fund, and their payment is made to depend upon the sufficiency of that fund, while bills and notes must be payable absolutely. *Martin* v. *City of San Francisco*, 16 Cal. 286.

21. These warrants are ineffectual for any purpose, except, perhaps, as evidence in an action founded upon the consideration for which they are given. *Ib.*

22. These warrants, with few exceptions, do not comply, in their form, with the requirements of the city charter, and would not constitute any authority to the treasurer to pay them, even if funds were in the treasury especially appropriated for their payment, because they do not specify the appropriation under which they were issued, and the date of the ordinances making the same. *Ib.*

WARRANTY.

1. In the common as well as the civil law, the defendant cannot avoid the payment of the purchase money on the ground that the title existed elsewhere than in the grantor; in order to constitute a breach of warranty or quiet enjoyment, there must be an eviction under the judgment of a competent court on a paramount title. *Fowler* v. *Smith*, 2 Cal. 44.

2. The use of a given name in a sale note for the goods sold is a warranty that the goods bear that name. *Flint* v. *Lyon*, 4 Cal. 21.

3. In case of a sale and delivery of a

special cargo with warranty, and a breach of the warranty, the plaintiffs might recover on the contract, and the defendants would be obliged to sue on the warranty or in the same action to recoup the the damages, under proper averments in the pleadings. *Ruiz* v. *Norton*, 4 Cal. 358.

4. Where land is sold with covenants of warranty, accompanied with a delivery of possession, for which a purchaser gives a note for the purchase money, the promise to pay and the warranty are independent covenants, and the enforcement of one is not dependent upon the performance of the other. *Norton* v. *Jackson*, 5 Cal. 264.

5. Where there is a covenant of warranty, the payment of the purchase money cannot be resisted as long as the grantee remains in possession. *Ib.*

6. A warranty will not be implied except in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of a sale by sample, or of provisions for domestic use. *Moore* v. *McKinlay*, 5 Cal. 473.

7. Where the plaintiff inspects the goods before purchasing, the case is taken from the operation of the rule of implied warranty. *Ib.*

8. To constitute a warranty no precise words are necessary; it will be sufficient if the intention clearly appear. *Ib.* 474.

9. There is no warranty in the following words of a sale note: "We have this day sold you two shipments of seeds for arrival." *Ib.*

10. Where a trustee had executed a covenant of warranty to a purchaser of a portion of trust lands, but was fully indemnified against loss thereby by the cestui que trust, and also held what he thought a sufficient portion of the purchase money so received as further indemnity, he is a competent witness. *Peralta* v. *Castro*, 6 Cal. 358.

11. An action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate cannot be maintained by the purchaser, who has taken possession of the premises sold, under a conveyance with express covenants. *Peabody* v. *Phelps*, 9 Cal. 226.

12. If a party takes a conveyance without covenants, he is without remedy in case of failure of title; if he takes a conveyance with covenants, his remedy, upon failure of title, is confined to them. *Ib.* 228.

13. Generally a vendor with warranty of title is not a competent witness for the vendee in a controversy concerning the title. *Blackwell* v. *Atkinson*, 14 Cal. 471.

14. In real estate, the covenant of warranty runs with the land, and the vendor is liable directly to the person evicted, and is not a competent witness for plaintiff. *Ib.*

15. A covenant of nonclaim in a deed amounts to the ordinary covenant of warranty, and operates equally as an estoppel. *Gee* v. *Moore*, 14 Cal. 473.

16. But this covenant is confined to the estate granted, and where that is "the right, title and interest" of the grantor, instead of the land itself, the covenant does not estop him from setting up an after-acquired interest. *Ib.*

17. In a contract for the sale and purchase of land, which is silent as to the possession, there is no implied license for the purchaser to enter. *Gaven* v. *Hagen*, 15 Cal. 211.

18. Z., the owner of land, contracts in writing to sell it to K., nothing being said as to the possession. K. is to give three notes, falling due at different periods, for the purchase money. The first two notes become due at very short dates, and after they are paid Z. is to make a deed to K., with covenants against his own acts. First note is paid before the second falls due; Z. deeds the land to plaintiff, subject to the contract with K., the deed containing covenants of warranty against acts of the grantor. Later, and on the day the second note is due, K. sells the land to McE., one of the defendants. K. took possession under the contract. Shortly after, plaintiff demanded of K. the payment of the second note, and tendered him a deed from himself (plaintiff) to K., with the covenants mentioned in Z.'s contract. K. said he could do nothing. Plaintiff then formally demanded payment and execution of the mortgage. K. wished to see his attorney. After the third note fell due, plaintiff demanded of McE. payment of the two notes, tendering the deed from Z. to him, (plaintiff) and also a deed from himself to McE., offering also a mortgage to be executed by McE. to secure the third note, and demanding possession. McE. refused: held, that, under the contract, the purchaser was not entitled to possession at once; that payment of the first two notes or tender was a condition

precedent to his right of possession; that until then, the vendor Z., or his assignee, had the legal title, and could maintain ejectment against the vendee. *Ib.*

19. In an action for the price of goods sold and delivered, there being a warranty as to the quality of the goods, the breach of the warranty may be relied on in defense, by way of recoupment, to mitigate the amount recovered; but it is not available as a complete defense to the action. *Earl* v. *Bull*, 15 Cal. 425.

20. In such an action, complaint contained two counts: one upon a special contract for the sale and delivery of the goods, the other upon a claim for goods sold and delivered. Answer denied the contract, and the other allegations of the complaint; but set up a contract between the parties somewhat different, containing a guaranty as to quality, and alleging that the quality of the goooods was not in accordance with the contract, and the breach was relied on as a complete defense. Evidence was introduced upon all the issues made by the pleadings. The court instructed the jury that, "if the plaintiffs, on the day the contract matured, presented their account and offered to deliver the goods, they fulfilled the contract on their part; and if the defendants did not, within a reasonable time, and within the custom of the trade, make their objection to the article sold, and offer to rescind the contract, they are bound by it, and plaintiffs should recover." Plaintiffs had verdict and judgment for the price: held, that in a subsequent action by the defendants against plaintiffs, on the breach of the warranty, for the difference in value between the goods delivered and those contracted for, the former suit is no bar; that the matter in dispute, to wit, this breach of warranty, was not adjudged; that the instruction of the court took that question from the jury, and directed them to decide the rights of the parties upon other considerations. *Ib.*

WASTE.

1. At common law there is no forfeiture of an estate for years for the commission of waste, but it was made so by the statute of 6 Edward I, and it was expressly confined to the place wherein the waste was committed; but the statute of California confines the remedy to the recovery of treble damages. *Chipman* v. *Emeric*, 3 Cal. 283.

2. In an action for waste, when treble damages are given by statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute or conclude to the damage of the plaintiff against the form of the statute. *Ib.* 240.

3. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity or when the subject matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief. *Hicks* v. *Michael*, 15 Cal. 116.

4. In cases of waste, if anything is about to be abstracted from the land which cannot be restored in specie, it is no objection to the injunction that the party making it may possibly recover what others may deem an equivalent in money. *Ib.*

5. On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title. *Ib.*

See TRESPASS.

WATER COURSES.

I. In general.

1. The State has absolute right to control, regulate and improve the navigable waters within its jurisdiction as an attribute of sovereignty. *Gunter* v. *Geary*, 1 Cal. 467; *Eldridge* v. *Cowell*, 4 Cal. 80.

2. In a controversy between two mining companies, it was competent to prove the execution of certain receipts for water purchased by the plaintiffs, as tending to show the existence of the company, and that it had actually located, and was in operation, at the time the receipts purport to be signed. *Lone Star Co.* v. *West Point Co.*, 5 Cal. 447.

3. A river, beyond the ebb and flow of the tide, may be navigable when it has sufficient depth and width to float a vessel used in the transportation of freight or passengers; and this has been extended to its capacity to float rafts of lumber. *American River Water Co.* v. *Amsden*, 6 Cal. 446.

4. To go beyond this, and declare a stream navigable which can float a log, would be to turn a rule intended for the benefit of the public into an instrument of serious detriment to individuals, if not of actual private oppression. *Ib.*

5. The only other instance in which a stream is navigable, is when it is so declared by statute; and when so declared navigable to a certain point, by implication it is declared nonnavigable above that point. *Ib.*

6. Plaintiff made a written contract with the defendants to dig for them a certain mining ditch, to be paid for by the defendants in a specified manner. Plaintiff dug the ditch and subsequently assigned his interest in the contract to L. & Co., to secure them certain payments due, and authorized them to receive the amounts due on the contract until their debt was paid. L. & Co. gave defendants notice of this assignment, and the defendants made several payments thereon: held, that plaintiff had no right to demand payment himself or sue upon the contract, while this assignment was outstanding. *Myers* v. *South Feather Water Co.*, 10 Cal. 582.

7. A court cannot judicially know that any article, much less water, contracted for at twenty-five cents per inch and proved on a certain day or at certain times to be worth a dollar an inch, is always, or is at any other time than that proved, worth the sum proved at the given time. *Ib.*

8. Plaintiff contracts to dig a ditch for a water company, the company agreeing to pay three dollars per rod, one-third of it in money on the completion of each mile, the other two-thirds to be paid in water at the rate of twenty-five cents per square inch delivered through an orifice under six inches of pressure, any where along and at the main ditch; the company having the right of paying the two-thirds in cash, instead of water, if they so elect: held, that said two-thirds, if elected to be paid in cash, need not be paid, as the other third, on the completion of each mile. *Ib.* 14 Cal. 277.

9. If payment could be made in water it could not be claimed before the completion of the ditch, and the cash cannot be required sooner. *Ib.*

10. Plaintiff having assigned this contract to L. & Co. as security for a debt due them by plaintiff, they demanded of the company payment of whatever was coming to plaintiff. The company elected to pay and did pay in cash on a statement as of so much money due: held, that even if L. & Co. had no right to receive money instead of water, yet the payment binds the plaintiff, for they were acting ostensibly for him or by his authority; that if he denied their authority the payment would not discharge his debt to L. & Co.; the assignment would remain in force and the plaintiff would have no cause of action here; that if he affirmed the arrangement made by L. & Co. in part, he must confirm the settlement as the liquidation of a money demand. *Ib.*

11. If the company paid L. & Co. more than was due them from plaintiff he must look to L. & Co. The assignment being general, L. & Co. were authorized to receive the entire amount, and became trustees of plaintiff for the excess. *Ib.*

12. A person has no right to construct a ditch through the inclosure of another without his consent. *Weimer* v. *Lowery*, 11 Cal. 112.

13. Plaintiff entered into a contract with defendants, by which the latter purchased of the former certain ditches for $14,500, payable $5,000 in cash, and $12,000 as follows, to wit: the expenses of

keeping said ditches in good order, of employing agents to attend to the same, being first deducted from the proceeds of the sale of water, the balance of the proceeds was to be applied to the liquidation until the whole was paid, "and to hasten and make certain the timely and early payment of said sum of money, by the sales as aforesaid, said company promise to furnish from their ditch, to be used in the above named ditches, so much water, which, added to the water supplied to said ditches from other sources, shall be sufficient to effect sales to the amount of $1000 per month; and when said company shall fail to furnish water as aforesaid, the said company hereby obligate themselves to pay to said Blen, interest at the rate of ten per cent. per annum on said monthly deficiency until met by receipts from sales over and above the said $1000 per month: held, that this contract is not an agreement on the part of defendants to pay the balance over the $2,000 only from the proceeds of the ditches named therein; but that it is a guarantee on their part that the mode of payment prescribed shall be effectual to pay the debt within a given time. *Blen* v. *Bear River and Auburn W. and M. Co.*, 15 Cal. 99.

14. The company were bound, by the contract, to furnish and sell the stipulated quantity of water, and apply the proceeds monthly to the payment of plaintiff's claim, and failing to do this, were responsible in damages. *Ib.*

15. The last clause in the contract does not give defendants a right to refuse to supply this water, but simply provides a measure of damages for the breach of it. *Ib.*

II. Appropriation of Water.

16. The foundation of a right to water is the first possession, and this is unfructuary and consists not so much in the fluid itself as in its use. The owner of the land over which it flows has the right to use it during its passage, but not in the corpus of the water, except while it continues in his possession. *Eddy* v. *Simpson*, 3 Cal. 251.

17. From the policy of our laws it has been held in this State that the right to running water exists, and without private ownership of the soil, and upon the ground of prior location upon the land, or prior appropriation and use of the water. *Hill* v. *Newman*, 5 Cal. 446.

18. The right to water must be treated in this State as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil. *Ib.*

19. The erection of a dam across a natural water course is an actual appropriation of the water at that point, but not below it, even though the water flowing over the dam is brought into the water course by canals constructed by the owners of the dam. *Kelly* v. *Natoma Water Co.*, 6 Cal. 108.

20. Possession or actual appropriation must be the test of priority of all claims to the use of water, wherever such claims are not dependent on the ownership of the land through which the water flows. Such appropriations cannot be constructive. *Kelly* v. *Natoma Water Co.*, 6 Cal. 108; *Hoffman* v. *Stone*, 7 Cal. 48; *Maeris* v. *Bicknell*, 7 Cal. 262.

21. In constructing canals, under the license of the State, the survey of the ground, planting stakes along the line, giving public notice, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and forms a series of acts of ownership which must be conclusive of the right. *Conger* v. *Weaver*, 6 Cal. 558.

22. The inclosure of the ground used in digging a canal, not being necessary for the work, would give its proprietors no higher rights, nor is it necessary, as notice to those who have received actual notice of the intended line of the canal. *Ib.* 559.

23. Where the owners of a ditch had commenced their ditch, and run their line before the location and appropriation of a lot of land by the plaintiffs, who sued them for trespass thereon: held, that a slight divergence in the construction of the canal from the original line, after the plaintiffs' location and appropriation, both lines running equally through the plaintiffs' claim, was no trespass in constructing the ditch on the new line, and if the plaintiffs suffered no actual injury by the change, it was damnum absque injuria. *Ib.*

24. The natural water in a dry ravine used to conduct water belongs to the first

appropriator thereof, and for either a diversion or appropriation thereof an action will lie. *Hoffman* v. *Stone*, 7 Cal. 49.

25. Merely cutting a ditch for a dam and using the water for no useful purpose gives no priority; but where the ditch is made for the purpose of using the water, the right thereto dates from the commencement of the work, and the mere change in the use of the water from one locality to another does not forfeit the right. *Maeris* v. *Bicknell*, 7 Cal. 263.

26. Where a ditch was cut by the grantors of the plaintiffs for the purpose of drainage simply, and not with the bona fide intention of appropriating the water thus diverted to some useful object, and the ditches of defendant were built for the express purpose of taking said water, and did do so: held, that thereby they gained a priority over the grantors of plaintiffs and all persons holding under them. *Ib.*

27. Where a party stands by and sees a ditch owner appropriate the water of a creek to his own use at a great expense, and does not inform him of his claim to the water, he and his vendees are estopped from afterward claiming the water. *Parke* v. *Kilham*, 8 Cal. 79.

28. The line where a ditch is actually intended to be dug, should be run within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditch owner date back to the survey. What is a reasonable time must depend upon the circumstances of the case. *Ib.*

29. Rights to the use of water become fixed after five years adverse enjoyment of the same. *Crandall* v. *Woods*, 8 Cal. 144.

30. A notice of intention to appropriate the waters of a certain stream is evidence of possession, but of itself alone is not sufficient. Taken with other acts it amounts to sufficient evidence. *Thompson* v. *Lee*, 8 Cal. 280.

31. The first appropriator of water for mining purposes is entitled to have the water flow without material interruption in its natural channel. *Bear River and Auburn W. and M. Co.* v. *New York Mining Co.*, 8 Cal. 330.

32. He is entitled to the water so undiminished in quantity as to leave sufficient to fill his canal or ditch as it existed at the time of subsequent appropriations of the stream above him. *Ib.* 332.

33. But as to the deterioration in the quality of the water by reason of being used for mining purposes before it reaches the ditch of the prior locator, it must be deemed damnum absque injuria. *Ib.* 333.

34. The right of the first appropriator of water is equally protected from damage occasioned by subsequent locators above him as well as below. *Hill* v. *King*, 8 Cal. 336.

35. Where parties have appropriated the prior right to the use of the water of a stream by the commencement and partial completion of a ditch and flume, they have the right to use so much of the waters of the stream as are necessary to preserve their flume from injury while in the process of construction. *Weaver* v. *Conger*, 10 Cal. 238.

36. Where parties projecting a ditch to convey water, give notice to the world of their intention to dig such ditch and appropriate such water in the usual manner, and mark out and designate the line of such ditch by the usual marks and indications, and pursue the work on the ditch with a reasonable degree of diligence until the same is completed so as to receive the water, they are entitled to such water as against all persons subsequently claiming or locating it. *Kimball* v. *Gearhart*, 12 Cal. 49.

37. Possession or actual appropriation is the test of priority in all claims to the use of water, where such claims are dependent upon the ownership of the land through which the water flows. *Ib.*

38. In appropriating unclaimed water on the public lands, only such acts are necessary and such indications and evidence of appropriation required as the nature of the case and the face of the country will admit of, and are under the circumstances and at the time practicable; surveys, notices, stakes and blazing of trees, followed by work and actual labor, without abandonment, will, in every case where the work is completed, give title to the water over subsequent claimants. *Ib.*

39. The title to the water conveyed through a ditch constructed in such manner will, on completion of the work, date back from the beginning of the work as against subsequent appropriators. *Ib.*

40. The mere act of commencing a ditch with the intention of appropriating the water, is not sufficient of itself to give a

party exclusive right to the water of such stream. The notice of the intention to appropriate the water must be sufficient to put a prudent man on inquiry. *Ib.*

41. The doctrine of relation in the appropriation of water, only applies when the first acts from which the party appropriating seeks to date his right to indicate the intention of appropriating such water. *Ib.* 50.

42. Where parties commence the construction of a ditch who have not at the time the pecuniary means to complete the same in a reasonable time, and they project the work and claim the water with a full knowledge of their pecuniary inability to complete the same within a reasonable time, they canot urge such want of means as an excuse for not prosecuting the work. *Ib.*

43. Any contract executed which passes the equitable right to a ditch and the use of the water appurtenant to or connected with the ditch as the property of the grantee is enough to insure to him the rights for which he stipulated as against an adverse claimant. *Ortman* v. *Dixon*, 13 Cal. 36.

44. A prior appropriator of the water of a stream for mill purposes is entitled to it to the extent appropriated, and for those purposes, to the exclusion of any subsequent appropriation of it for the same or any other purpose. *Ib.* 38.

45. The extent of the right depends on the nature and uses of the appropriation. If he suffers a portion of the water or the body of it, after running through the mill, to go on down its accustomed course, persons below may appropriate this residuum so as to make it a vested right. *Ib.* 39.

46. No distinction can be drawn between a mill owner and a miner as to their rights in appropriating water. *Ortman* v. *Dixon*, 13 Cal. 391; *McDonald* v. *Bear River and Auburn W. & M. Co.*, 13 Cal. 233.

47. Whether plaintiffs—who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch or flume, and appropriate the water for mining purposes—began their surveys, etc., and prosecuted their work to completion with due diligence, as against parties attempting subsequently to appropriate the water, is a question for the jury, and their verdict, on conflicting testimony, will be conclusive. *Weaver* v. *Eureka Lake Water Co.*, 15 Cal. 273.

48. Suit by plaintiffs as prior appropriators of the waters of Middle Yuba river, for damming up and diverting the water of three lakes situated one above the other, opening into each other, and discharging their water into the Middle Yuba river through the same channel, which is about a mile long, and is called "lake stream." The quantity of water varies with the seasons. Sometimes the stream is a torrent, and sometimes it is almost or quite dry. Defendants, to create a supply for their ditch during the summer, erected a dam at the outlet of each lake, converting it into a sort of a reservoir, from which the water was drawn as needed, contending that the circumstances justified the erection of the dams, and that the great value of the lakes as reservoirs justified the injuries resulting to plaintiffs: held, that there is no law for such position; that if the injuries to plaintiff were trivial, they would be damnum absque injuria, but that the legal superiority of conflicting rights cannot be determined by a comparison of their value. *Ib.* 274.

49. To render valid a claim of water by appropriation, the claim most be for some useful or beneficial purpose, or in contemplation of a future appropriation for such purpose by the parties claiming it. A claim for mere speculation will not answer. *Ib.* 274.

III. Diversion of Water.

50. If the water of the stream A be diverted by C and used by him, and then flow into stream B, it is lost to its first possessor, and he has no right to the increase of the stream. *Eddy* v. *Simpson*, 3 Cal. 251.

51. Justices of the peace have no jurisdiction to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted. *Hill* v. *Newman*, 5 Cal. 445.

52. Possession of pueblo land gives the right to use the water flowing through it for natural wants, but does not confer the right to divert it, and prevent its running upon the adjoining land of another who

has taken the same up subsequently, but before the attempt to change the course of the water. *Crandall* v. *Woods*, 8 Cal. 141.

53. In an action for damages for the diversion of water from the plaintiff's ditch, the defendants denied the diversion, and alleged that the water used by them was used by agreement between the Volcano Water Co. and themselves, and that the water came from the reservoir of the Volcano Water Co. On the trial, after the plaintiffs had introduced in evidence the judgment wherein the right to the use of the water had been adjudged between the plaintiffs and the Volcano Water Co., and offered to prove by oral testimony that the water used by defendants is the same water that was in controversy in that suit: held, that such evidence was proper and should have been admitted, as there was no other means than by parol of establishing this fact. *Walsh* v. *Harris*, 10 Cal. 392.

54. The policy of the State, as indicated by her legislation, in conferring the privilege to work the mines, equally confers the right to divert the streams from their natural channels. *Irwin* v. *Phillips*, 5 Cal. 145.

55. At common law the diversion of water courses could only be complained of by riparian owners who were deprived of the use, or those claiming directly under them. *Ib.*

56. Miners are to be protected in their rights in the possession of their selected localities, and the rights of those who by prior appropriation have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. *Ib.* 146.

57. If a miner locates upon a stream, the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to intefere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection. *Ib.* 147.

58. A general allegation in a complaint for the diversion of water, that plaintiffs were entitled to all the water flowing into the cañon at the head of their ditch, entitles them to prove a diversion of water from the smaller branches of the cañon supplying water to that point. *Priest* v. *Union Canal Co.* 6 Cal. 171.

59. Where the complaint alleged that the defendants had dug a mining ditch above one previously constructed by defendants, and had thereby diverted the water of the stream from plaintiff's ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued: held, that it was sufficient for the recovery of damages, but not to sustain an injunction. *Coker* v. *Simpson*, 7 Cal. 341.

60. To turn aside a useful element from premises is as much a nuisance as to turn upon them a destructive element. *Parke* v. *Kilham*, 8 Cal. 79.

61. Actions for the diversion of the waters in ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Ib.*

62. A ditch to convey off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood it. *Ib.* 80.

63. A complaint alleging that plaintiffs are the owners and in possession of certain mining claims on a certain stream, which had been diverted, to their injury, by defendants, sets forth a sufficient cause of action. It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof. *Leigh Co.* v. *Independent Ditch Co.*, 8 Cal. 323.

64. A complaint alleging plaintiffs had for a long time conveyed water from a stream for mining purposes by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof when defendants wrongfully diverted the same and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction. *Tuolumne Water Co.* v. *Chapman*, 8 Cal. 397.

65. The allegation in the complaint that defendants wrongfully claim some pretended or fictitious right to the use of the water, does not prejudice the right of the plaintiffs to the injunction. *Ib.*

66. No equitable remedy can be had for

a mere past diversion of a water course; but when the injury is continuing, relief may appropriately be sought in equity. *Ib.* 398.

67. Where the defendants had constructed a ditch for mining purposes, and the plaintiffs had subsequently constructed another, taking its water from the same stream, and brought suit for damages sustained by reason of an enlargement of defendants' ditch, made after the commencement of plaintiffs' ditch, causing a diversion of a great quantity of water, and praying for an injunction: held, that defendants are not limited to the quantity of water turned into their ditch in the first instance, unless by the general plan, size and grade of the ditch it was not capable of carrying more water than was then diverted. *White* v. *Todd's Valley Water Co.*, 8 Cal. 444.

68. If by reason of obstructions in the ditch, or irregularity in the grade at that time, it was not capable of diverting as much water as its general size would indicate, the defendants would have a reasonable time to adjust the grade and remove such obstructions, and then fill the ditch to its capacity. *Ib.*

69. But if they continued to divert only the original quantity of water long enough to indicate that they only intended to divert that amount, or failed for an unreasonable length of time to remove the obstructions or adjust the grade, they would be limited to the amount thus diverted, and plaintiffs would be entitled to the residue. *Ib.*

70. Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction to prevent future injury is proper. *Marius* v. *Bicknell*, 10 Cal. 224.

71. In an action to try the right to the use of water and for damages for diverting it, where the amount for which judgment is given is less than two hundred dollars, it will carry costs. *Ib.*

72. In an action for diverting water from the plaintiff's ditch, and where both parties claimed in part the waters of the same stream: held, that the following instruction was properly given by the court: "That defendant is not liable for any deficiency of water in plaintiff's ditch, unless he was diverting from Rabbit Creek more water than he was entitled to at the precise time that such deficiency existed." *Brown* v. *Smith*, 10 Cal. 511.

73. So where the court instructed the jury that if they believed that defendant's ditch was so filled with tailings during the period of the alleged injury, that it was incapable of diverting the waters of the creek, then plaintiff cannot recover. *Ib.*

74. The first appropriator of the water of a stream passing through the public lands in the State, has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purposes of its appropriation. To this extent his rights go, and no further. In subordination to those rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle its waters with other waters and divert an equal quantity as often as they choose. *Butte Canal and Ditch Co.* v. *Vaughn*, 11 Cal. 153.

75. In an action for damages for the diversion of water from the plaintiff's ditch, the deposition of one of the owners in the ditch was taken by the plaintiff, and subsequently, and before the trial, the witness conveyed by deed his interest in the ditch to plaintiff: held, that such deed of conveyance did not pass the witness' right to the damages, and hence he was an incompetent witness. *Kimball* v. *Gearhart*, 12 Cal. 46.

76. The subsequent deed to plaintiff, though it carried the property and the future use of the water, did not retract and carry the right to damages for the past illegal use of it, any more than a deed of land carries the remedies for past trespass. *Ib.* 47.

77. The mere right to water is a sort of incorporeal thing, but the water itself is substantial and tangible, and as the right gives the control and possession of this commodity, and entitles the party to damages for its diversion by another, we do not see why this right may not be acquired by two or more acting together, or why, when they do acquire it, they do not hold it as other property, and may not sue as such for any unlawful interference with it. *Ib.*

78. Where parties go to issue in actions for the diversion of water upon general averments and denial of title, anything

that legally supports or attacks the title is admissible in evidence. *Ib.* 49.

79. In an action of damages for diverting the water of a river from plaintiff's mill, an averment in the complaint of possession of the land and mill is sufficient against a trespasser, without averring riparian ownership or prior appropriation of the water. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 13 Cal. 230.

80. V. erects a mill and acquires a water right in 1850. In 1851 defendants appropriate for ditch purposes water from the same stream, forty miles above the mill. In 1854, plaintiffs, M. & B., succeed to the possession of V.: held, that plaintiffs may possibly recover damages for the diversion of water in their possession without connecting themselves with the title of V. back to 1850; that defendants' appropriation in 1851 could only be of the water not appropriated by V., there being no abandonment, and that M. & B. can jointly maintain an action for damages accruing after they came into possession. *Ib.* 236.

81. In an action for diverting water from plaintiff's ditch, plaintiff and defendants both having ditches supplied from the same stream, the plaintiff's rights being prior and paramount, defendants asked the court to instruct the jury, that if defendants had brought water from foreign sources, and emptied into the stream with the intention of taking it out again, they had the right to divert the quantity thus emptied in, "less such amount as might be lost by evaporation, and other like causes." The instruction was given, with the explanation, that they could not so reclaim the water as to diminish the quantity to which plaintiff was entitled as prior locator: held, that the explanation was proper, the concluding words of the instruction being too general and indefinite. *Burnett* v. *Whitesides*, 15 Cal. 37.

82. The jury having found plaintiff entitled to the use of so much of the water flowing in the stream as would run in a ditch of a certain capacity, a judgment was entered, following the verdict: held, that the judgment is not erroneous as not distinguishing between the water ordinarily flowing in the stream and the water from foreign sources emptied in by defendants. The law regulates the rights of the parties in this respect, and the judgment must be construed with reference to such law. *Ib.*

83. Plaintiffs file their bill in equity to enjoin the defendants from diverting a certain quantity of the water from Bear river, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes; that such quantity was necessary for their use, and that defendants had diverted the same, to their damage, etc. Plaintiffs had verdict and judgment for $21,800 damages: held, that the averments are insufficient to entitle plaintiffs to an injunction; the scope of the bill being simply to enforce in equity plaintiff's alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. *McDonald* v. *Bear River and Auburn Water and Mining Co.*, 15 Cal. 148.

84. Held, further, that plaintiffs should be permitted, if they desire, so to amend their complaint as to present for determination their legal rights, otherwise the complaint should be dismissed. *Ib.*

85. Running water, so long as it continues to flow in its natural course, cannot be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property, but this right carries with it no specific property in the water itself. *Kidd* v. *Laird*, 15 Cal. 179.

86. The owner of a ditch has the exclusive and absolute power of control, and right of enjoyment of the water diverted by and flowing in his ditch; but whether such water be his private property, it is not necessary to decide. *Ib.*

87. A person entitled to divert a given quantity of the water of a stream, may take the same at any point on the stream, and may change the point of diversion at pleasure, if the rights of others be not injuriously effected by the change. *Ib.*

88. This right so to change the point of diversion does not depend upon how the right to use the water was acquired, whether by express grant or by prescription; or whether it rests in the parol license, or the presumed consent of the

proprietor. The difference as to the source of the right relates to the mode of determining its existence and extent, and not to the manner of its exercise and enjoyment. *Ib.* 180.

89. In this case, the rights of both parties, as fixed by the priorty and extent of their respective appropriations, though not founded on the legal title, are as perfect and absolute as if acquired by prescription, or express grant from the riparian owner. *Ib.* 183.

IV. Abandonment of Water.

90. Where water from an artificial ditch is turned into a natural water-course, and mingled with natural waters of that stream to conduct it to another point to be used, it is not thereby abandoned, but may be taken out and used by the party thus conducting it, so that he do not in so doing diminish the quantity of the natural streams to the injury of rights previously acquired therein. *Hoffman* v. *Stone*, 7 Cal. 49; *Merced Mining Co.* v. *Fremont*, 7 Cal. 325; *Butte Canal and Ditch Co.* v. *Vaughn*, 11 Cal. 151.

91. A ditch company who avail themselves of a dry ravine to conduct their water a portion of the distance to their dam where they use it, do not abandon the water thus carried by them, and are entitled to the same enjoyment of it as if conducted through an artificial ditch. *Hoffman* v. *Stone*, 7 Cal. 49.

92. We will not presume an abandonment of property in a dam and ditch for mining purposes from the lapse of time. *Patridge* v. *McKinney*, 10 Cal. 183.

93. Where water from an artificial ditch is turned into a natural water-course and mingled with natural waters of the stream for the purpose of conducting it to another point to be there used, it is not thereby abandoned, but may be taken out and used by the party thus conducting it, so that he do not in so doing diminish the quantity of the natural waters of the stream to the injury of those who have previously appropriated such natural waters. *Butte Canal and Ditch Co.* v. *Vaughn*, 11 Cal. 151.

94. The burden of proof devolves on the party thus mingling the water belonging to him with that appropriated by others. He can only claim such quantity to which he establishes his right by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled. *Ib.* 152.

95. The prosecution of the purpose to appropriate water for mining uses is a necessary element of title; and the negation of this, the abandonment of the purpose, is not so much matter of avoidance in title as it is matter showing that no title was ever obtained. *Kimball* v. *Gearhart*, 12 Cal. 50; *McGarrity* v. *Byington*, 12 Cal. 431.

96. The mere fact that a party chose to apply water which he had a right to use in mining, in whole or in part, if he so chose, in sawing timber and grinding wheat, is no abandonment of his title to it. *McDonald* v. *Bear River and Auburn W. & M. Co.*, 13 Cal. 237.

V. Injuries caused by Water.

97. A prior locator of a mining claim on the bank of a stream has a right to use the bed of the stream for the purpose of fluming or working his claim, and any subsequent erection, dam or embankment, which will turn the water back upon such claim or hinder it being worked with flumes, or other necessary means or appliances, is an encroachment upon the rights of said party, and he is entitled to recover the damages consequent upon such obstructions. *Sims* v. *Smith*, 7 Cal. 150.

98. Where the plaintiff sued for an injury to his mining claim, by the breaking of defendant's canal, which was constructed prior to the location of plaintiff's claim, neither party claiming ownership of the soil, and no negligence in fact being shown other than that which the law would presume from the breaking of the ditch: held, that the rights of the parties were acquired at the dates of their respective locations, and that rule of coming to a nuisance may be applied. *Tenney* v. *Miners' Ditch Co.*, 7 Cal. 339.

99. There is no doubt that the ditch owners would be responsible for wanton injury or gross negligence, but they are not liable for a mere accidental injury,

where no negligence is shown, to a miner locating along the line subsequent to the construction of the ditch. *Ib.* 340.

100. A complaint which alleges that the plaintiffs were on a certain day owners and proprietors of a certain valuable water ditch, for the purpose of conveying water, and at which time and place the defendants were also the owners of a certain other water ditch, for the purpose aforesaid, and that afterwards on the same day and year, at, etc., aforesaid, the said defendants' ditch was so badly and negligently constructed and managed, that the water therein flowed over and upon the ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth and rubbish, and breaking said plaintiffs' ditch to the damage of $3,000, and thereof they bring suit, is sufficient. *Tuolumne County Water Co.* v. *Columbia and Stanislaus Water Co.*, 10 Cal. 195.

101. In an action for damages for breaking of defendants' dam and flooding the plaintiffs' mining claim, where the complaint is in one count and charges "that the defendants' said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of said defendants, broke away," etc.: held, that the complaint is sufficient. *Hoffman* v. *Tuolumne Water Co.*, 10 Cal. 416.

102. Whether such negligence arose from the want of care in constructing the dam, or want of care in letting off the water, is not sufficiently material, under our system of pleading, to require separate counts. *Ib.* 417.

103. In such a case, where the court instructed the jury "that if they believe that the dam was improperly or artificially constructed, or that defendants could have constructed it in a better or more substantial form so as to prevent its breaking, then they are liable:" held, that such charge is too broad, and the court erred in giving the same. The question is not what the plaintiffs could have done, but what discreet or prudent men should do, or ordinarily do in such cases, where their own interests are to be affected. *Ib.*

104. If the dam were to break without any negligence, or through inevitable accident, it would be the duty of the party to repair it and stop the injury as soon as practicable. *Ib.* 418.

105. The mere fact that the rock upon which the timbers of the dam lay presented outwardly a solid appearance, etc., does not necessarily show due diligence in making it a foundation, since many other circumstances, such as the knowledge by the defendants, or the builder, of the character or qualities of such rock, or a knowledge of it from testing it, etc., might still show it was unsafe for this purpose. *Ib.*

106. The owner of a ditch is bound to use that degree of care and caution in its construction and management, to prevent injury to others, which ordinarily prudent men use in like instances when the risk is their own. *Wolf* v. *St. Louis Independent Water Co.*, 10 Cal. 544.

107. The question of negligence in the management of such property, and the degree of it, must necessarily depend in a great measure upon the surrounding facts, such as the existence and exposure of property below the dam, and the like, for what under one state of facts would be prudence, might under a different condition of things be gross or even criminal negligence. *Ib.*

108. In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendants' dam, and the consequent washing away of the pay dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler* v. *Sears Union Water Co.*, 12 Cal. 558.

109. Action for damages to a mining claim by overflow and leakage from defendants' ditch. To question by plaintiff to one of his witnesses, "Did you see water splashing over the flume?" he answered "yes." Defendant, on cross-examination, proposed to ask, "whose water was that you saw splashing over the flume?" held, that the question was proper, even though it went to the ownership of the water. *Jackson* v. *Feather River and Gibsonville Water Co.*, 14 Cal. 23.

110. Each person, mining in the same stream, is entitled to use, in a proper and reasonable manner, both the channel of the stream and the water flowing therein. Where, from the situation of different claims, the working of some will necessarily

result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be damnum absque injuria, and will furnish no cause of action to the party injured. The reasonableness in the use is a question for the jury, to be determined by them upon the facts and circumstances of each particular case. *Esmond* v. *Chew*, 15 Cal. 142.

111. Plaintiffs owned certain mining claims in the bed or channel of a stream. Defendants owned claims in the same stream, above and adjoining the claims of plaintiffs, defendants' claims being located first. Defendants constructed a flume, running from their own claims to and upon plaintiffs' claims, and through this flume a large quantity of the tailings was deposited on plaintiffs' claims, to their great damage. The flume was constructed for the purpose of working defendants' claims; was proper and necessary for that purpose, and the deposit of tailings was occasioned by the ordinary working of the claims. The court instructed the jury, that a person first locating a mining claim in the bed of a stream is entitled to the channel below as an outlet, and that when such outlet, from the usual mining operations above, becomes obstructed, he may open the same; and if he can do so by no other means, may construct a flume down the channel as far as necessary, and as far as it can be constructed without considerable damage to the claims subsequently located: held, that the instruction was wrong; that the defendants were not entitled, as matter of strict legal right, to an easement upon plaintiffs' claims for the purposes mentioned; that the doctrine that, under certain circumstances, one person may have a right of way by necessity over the land of another, does not apply to this case; and further, that this court does not recognize the doctrine, that one person can go on the land of another and erect thereon buildings or other structures; and that mining claims stand on the same footing in this respect as other property; that if the acts of defendants were authorized by any local custom or regulation, its existence should have been averred and proved. *Ib.*

WATER LOTS.

1. In the plan of the city of San Francisco, the survey into blocks, lots and streets extended into the tide waters in front of the city, the object of which was to reach a sufficient depth of water on the land line for the convenience of shipping, and it necessarily anticipated that the water lots would be filled up to a level, suitable for building and land carriage. *Eldridge* v. *Cowell*, 4 Cal. 87.

2. The act of March 26th, 1851, which requires the city of San Francisco to deposit in the office of secretary of State a map of the water lot property granted to the city by the act, does not make such map conclusive evidence of the extent of said property: as the boundaries are completely specified in the act, the question of what was the water line of the city at the date of the act is one of fact. *Cook* v. *Bonnet*, 4 Cal. 398.

3. Alcalde grants of beach and water lots in San Francisco, not recorded on or before the third of April, 1850, in some book of record in the possession or under the control of the recorder of San Francisco, are void. *Chapin* v. *Bourne*, 8 Cal. 294.

4. The act of the twenty-sixth of March, 1851, granted to the city of San Francisco certain beach and water lot property in San Francisco for ninety-nine years. The sale by the State board of land commissioners under the act of May 18th, 1853, passed nothing but the reversionary interest of the State. *Ib.*

5. The pueblo regulation, forbidding grants within two hundred varas of the bay to be made, had reference only to a portion of the present city front. *Norton* v. *Hyatt*, 8 Cal. 540.

6. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition either precedent or subsequent annexed to the grant. *Holladay* v. *Frisbie*, 15 Cal. 634.

7. Nor does the proviso create a trust in the city in favor of the State, so far as

the property itself is concerned; that is to say, the estate granted is not, by force of the proviso, held in trust partly for the benefit of the State. The interest of the city in the property is a legal estate for ninety-nine years. When the property is once sold or disposed of by the city, it is not charged with the payment of the percentage in the hands of the grantee or purchaser. That is a duty devolving on the city, with which the grantee or purchaser has no concern. *Ib.*

8. If there be any trust created by the proviso, it is only a trust in the one-fourth of the proceeds which the city may receive, amounting only to a covenant on the part of the city, which in no wise qualifies the grants or affects the legal estate of the city in the premises. *Ib.*

9. The beach and water lot property mentioned in the act is not devoted by the grant to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is a leviable interest, subject to sale under execution. *Ib.* 635.

10. The proviso to the act operates only as a covenant on the part of the city, that if she make any sale or other disposition for any moneys, twenty-five per cent. of the same shall be paid into the State treasury. On the other hand, if the property be disposed of without the receipt of any moneys by the city, no obligation arises in favor of the State. *Ib.* 636.

11. *Smith* v. *Morse*, 2 Cal. 524, deciding that the city's interest in this beach and water lot property can be sold on execution against the city, not to be disturbed; but any rights which "the commissioners of the funded debt of the city of San Francisco," under the act of May 1st, 1851, may possess in the property, are not passed on. *Ib.* 637.

12. Whatever interest the city of San Francisco, as defined by the charter of 1851, had in her beach and water lot property on the first day of January, 1755, was transferred to and vested in the parties who were in the actual possession thereof on that day, provided their possession was continued up to June 20th, 1855, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process, by virtue of the Van Ness ordinance and the act of March 11th, 1858, ratifying and confirming the same; and such parties can defeat the claim of plaintiff, who holds under a conveyance by the president and two members of the board of land commissioners, created by act of May 18th, 1853, providing for the sale of the State's interest in the property within the water line front, as defined by the act of March 26th, 1851. *Ib.*

13. The interest of plaintiff derived from a conveyance of the commissioners under the act of May 18th, 1853, is only to the reversion after the ninety-nine years designated in the act of March 26th, 1851. *Ib.* 638.

14. A purchaser of beach and water lot property at a sheriff's sale, in August, 1851, on execution issued upon a judgment recovered in January, 1851, against the city of San Francisco, acquired a title, if a judgment became a lien upon the property sold, previous to the act of May 1st, 1851, and the conveyance from the commissioners of the sinking fund to the commissioners of the funded debt. *Wheeler* v. *Miller*, 16 Cal. 125.

15. In this case, as the record does not show that the judgment ever became such lien, the decision, giving title to the purchaser, must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. *Ib.*

WAY, RIGHT OF.

1. The owner of a building leased a portion of it, there was access to the part reserved without going through the part leased: held, that the lessee had no implied right of way to the part reserved through any portion of the lessee's premises. *Ramirez* v. *Mc Cormick*, 4 Cal. 246.

WEIGHTS.

1. Where a county is already in possession of a set of weights and measures according to law, it cannot be held liable for a new set purchased by the deputy sealer of weights and measures. *Levy* v. *Supervisors of Yuba County*, 13 Cal. 636.

WHARF.

1. A mere right to collect wharfage and dockage for a certain term of years is neither real estate nor personal property, but a franchise or incorporeal hereditament, an uncertain profit issuing out of a realty, and this property is not taxed by the revenue law of 1851. *Dewitt* v. *Hays*, 2 Cal. 468.

2. Where a municipality have the right to erect, repair and regulate wharves and the rates of wharfage, and the banks of the river in front of the city are dedicated to the public, it follows that the right to collect wharfage devolves on the corporation. *City of Sacramento* v. *Steamer New World*, 4 Cal. 43.

3. Wharfage is applied to a charge for landing goods, whether upon an artificial bank or a natural landing. *Ib.*

4. An action for wharfage can be maintained, although the law imposing it speaks only in terms of a charge for arrivals. *City of Sacramento* v. *Steamer Confidence*, 4 Cal. 45.

5. The proprietor of a wharf may insist on compensation for the use made of his wharf above the line of low water, but no compensation can be obtained for that part of the wharf below the line of low water. *Gunter* v. *Geary*, 1 Cal. 469.

6. The premises in dispute are leased for six years. The provisions of the lease were that the lessees should build a wharf on the land, but stipulated for no particular time: held, that the lessor, before the expiration of the term, could have no legitimate cause for complaint. *Chipman* v. *Emeric*, 5 Cal. 51.

7. A wharf company is bound to keep its wharf in proper condition, and is liable for losses sustained by reason of its neglect to do so. *Finn* v. *Vallejo Street Wharf Co.*, 7 Cal. 256.

8. Under the act of 1852 incorporating the town of Oakland, the corporate and municipal powers were lodged in a board of trustees. The board had power "to lay out, make, open, widen, regulate and keep in repair, all streets, bridges, ferries, public places and grounds, wharves, docks, piers, slips, sewers and alleys, and to authorize the construction of the same." Under this clause the board, by ordinance, gave defendant the exclusive privilege of laying out, establishing, constructing and regulating wharves, etc., within the city, for thirty-seven years: held, that the ordinance was void as being a transfer of the corporate powers of the board; and that the present city of Oakland being the successor in law of the town of Oakland, can come into equity to have the ordinance declared void, and the wharves, etc., held by defendants thereunder delivered up. *City of Oakland* v. *Carpentier*, 13 Cal. 549.

9. Bill for an injunction to restrain defendants from taking possession of certain real estate—a warehouse and wharf. Complaint avers plaintiff's title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and are using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed: held, that these allegations are insufficient to authorize an injunction—there being no averment of insolvency of defendants, and the complaint not showing that there is no adequate remedy at law, and that in such case, forcible entry and detainer would be a speedy mode of regaining the possession, if taken by defendants, and for other damages the usual proceedings at law would suffice. That the premises are used in connection with the transportation business, which would be interrupted by the

threatened trespass, is not alone a ground for equitable interference. *Tomlinson* v. *Rubio*, 16 Cal. 206.

WIFE.

See HUSBAND AND WIFE.

WILL.

1. Where a will was executed in 1846, by a Mexican citizen in California before the judge of the place, who certified at the foot of the will that the testator was possessed of his entire judgment and understanding, and retained his perfect memory, it was held that the person contesting the will must establish the contrary. *Panaud* v. *Jones*, 1 Cal. 498.

2. Evidence may be offered to prove a custom that no more than two witnesses were necessary to the validity of a will. *Ib.* 500.

3. Wills, under the Spanish law, were divided into open and nuncupative, and sealed or written wills. *Ib.* 501.

4. The law, wisely, does not require the same formalities and strictures of proof in respect to an open will as in the case of a sealed testament, for there would not be the same danger of forgery and imposition. *Ib.* 502.

5. A nuncupative will may be made viva voce and dictated, and need not be signed by the testator. *Ib.* 503.

6. An executor named in a will, who is neither heir nor legatee, may be a witness to the execution of a will. *Ib.* 505.

7. A will is valid although one of the subscribing witnesses was an alcalde of the place. *Ib.*

8. The formalities and necessity of opening and publishing a sealed will, considered. *Ib.* 507.

9. The observance of formalities in respect to proving an open or nuncupative will seems to be a useless ceremony where the will has been made openly, and published by the testator during his lifetime. *Ib.* 508.

10. Where two executors are named in a will, both must necessarily join in the execution of the powers conferred therein but the testator may confer upon each of his executors all the powers necessary, and he who first enters upon the administration shall proceed to its conclusion. *Ib.* 511.

11. A husband, during his life time, and after the death of the wife, may, although there have been children of the marriage, dispose of the gananciales for any honest purpose when there is no intention to defraud the children, and may, by will, direct their sale to pay his debts. *Ib.* 512.

12. The taking of a legacy by the wife under her husband's will does not prevent her from contesting the validity of the will, so far as it disposes of her half interest in the common property to others. *Beard* v. *Knox*, 5 Cal. 256.

13. The fact that a will was begun on one day, and finished several days afterward, the delay being for the purpose of procuring a competent person to direct the manner of drawing it, it seems is no ground for invalidating a will under a Mexican law. *Castro* v. *Castro*, 6 Cal. 160.

14. The strictness of the rules of the civil law, requiring five, or at least three, witnesses to a will, was relaxed expressly in favor of remote districts, and two witnesses were sufficient to a will by the custom of California. *Tevis* v. *Pitcher*, 10 Cal. 477.

15. A will takes effect on proof of its execution, in the absence of a statute requiring it to be probated. *Ib.* 161.

16. After twenty years acquiescence in the terms of a will, an heir should not be allowed to dispute his own acts, or to contest the will on abstract points of law, which had never any force in California. *Ib.*

17. The will of a testator dying before the organization of the State government did not require to be probated under the then existing laws. *Grimes* v. *Norris*, 6 Cal. 624.

18. Our statute of wills not only fails to require the probate of wills executed before its passage, but it must from its terms be concluded that the legislature actually

intended to exclude such wills from the operation of the statute altogether, leaving their validity to depend upon the laws under which they were made, and not disturbing rights which had grown up under the former system. *Ib.* 625.

19. A will only becomes executed upon the death of the testator, and therefore this construction does not affect wills made before the passage of the statute, where the testator did not die till after its passage. *Ib.*

20. Property in this State acquired by the husband after marriage, but before the passage of the act of April 17th, 1850, is common property under the Mexican law, as that so acquired subsequently is by the statute, and cannot be disposed of by will. *Estate of Buchanan*, 8 Cal. 509.

21. A posthumous child, for whom no provision is made in the will of the father, is entitled to one-half of the separate and common property, where no express intention of the testator to the contrary appears. *Ib.*

22. The several statutes of this State relating to wills do not apply to wills executed previous to their passage. There is no provision for the probate of such wills, and they must rest for their validity upon the laws under which they were made. *Tevis* v. *Pitcher*, 10 Cal. 477.

23. Under the Mexican law, as enforced in California, such a proceeding as the probate of an open will was unknown. The will took effect as a conveyance upon the death of testator. It was valid if made in the presence of three witnesses, and by the custom which prevailed in California and obtained the force of positive law, two witnesses were sufficient. *Ib.*

24. Where a will was attested by two witnesses and made before a person who was a sindico: held, the fact that such person signed the instrument as sindico did not the less render him a witness. *Ib.*

25. Where the testator and the witnesses to a will are dead, proof of the signatures of the witnesses and of the testator will be sufficient evidence of its due execution. *Ib.* 478.

26. Citation to heirs to show cause against probate of will, etc., not served, is no objection to the jurisdiction of the probate court, if the heirs answer. The want of due service goes only to the service itself. *Abila* v. *Padilla*, 14 Cal. 106.

27. A will made in Texas, operating upon property there situated, must be interpreted by the law of that State. To that law reference must be had, to determine the capacity of the testator, the extent of his power of disposition, and the condition upon which the power of alienation vested in the guardian of his children, appointed by the will, is to be exercised. *Norris* v. *Harris*, 15 Cal. 254.

28. In the absence of proof as to the laws of Texas, the courts of this State, in interpreting a will made in that State, will presume its laws to be in accordance with the laws of California. *Ib.*

29. D., a resident of Texas, and possessed of property situated in that State, makes a will, giving all his estate, real and personal, to his wife and children, in equal interest, one with the other, and investing his wife with the sole and entire control of the whole estate during her life, for the benefit of herself and children, free from the control and guidance of the courts of law in that or any other State where she may happen to reside at the time of his death, with full and complete power in her own name, and as guardian of his children, to sell and convey, or exchange, any portion of all his estate, and to give title to the same, and purchase with the proceeds such other property as she might deem best for her own interest, and that of her children, "without the intervention or interposition of any court whatever," and appointing her executrix of his will and guardian of his children: held, that, under the will, the wife has power to sell the entire property of the estate; and that, describing herself in a bill of sale, as "executrix," etc., does not limit the estate sold to her interest as such executrix; the designation being intended merely to identify herself as the individual mentioned in the will. The designation does not operate as a limitation upon her power. *Ib.*

30. The statute of this State, relative to guardians, and the disposition of the estate left to wards, only applies when there is no direction by will as to such disposition. *Ib.*

31. Where a will appoints a guardian, there is no necessity for the issuance of any letters of guardianship to authorize the guardian to act. The guardian's authority comes directly from the will. *Ib.*

32. In this State there is no limitation upon the power of disposition by will. *Ib.*

33. An order of a probate court setting aside a judgment of that court refusing to admit a will to probate is not an appealable order, because not within section two hundred and ninety-seven of the act to regulate the settlement of the estates of deceased persons. *Peralta* v. *Castro*, 15 Cal. 511.

WITNESS.

I. In general.

1. Unless the record shows that the interest of the witness is sufficient under our statute to disqualify, the appellate court will deem the parties entitled to the benefit of his testimony. *Johnson* v. *Carry*, 2 Cal. 36.

2. It is the duty of the court to decide upon the admissibility of a witness objected to for interest; and it is error to refer the question to the jury upon the evidence, with instructions to disregard it if they believe the witness interested. *Tabor* v. *Staniels*, 2 Cal. 240.

3. Where a witness is rejected for incompetency, the record must show the specific purpose for which he is offered to assign error. *Sparks* v. *Kohler*, 3 Cal. 301.

4. The testimony of a witness must be excluded when he would be benefited by it. *Jones* v. *Post*, 4 Cal. 14.

5. A survey may be detailed from memory by a witness, as well as defined by a diagram, but must by statute be excluded, unless the witness be the county surveyor, or be introduced to rebut or explain a survey of the county surveyor. *Vines* v. *Whitten*, 4 Cal. 230.

6. A book-keeper, as a witness, has a right to refer to books kept by him, to refresh his memory. *Treadwell* v. *Wells*, 4 Cal. 263.

7. The code provides that "no Indian or negro shall be allowed to testify as a witness in any action in which a white person is a party:" held, that it is designed to include all races not white, and that the Chinese, as East Indians, are excluded. *People* v. *Hall*, 4 Cal. 399; *Speer* v. *See Yup Co.*, 13 Cal. 73; *People* v. *Elyea*, 14 Cal. 145.

8. Our code authorizes the court to make an order directing a party to produce books and papers into court on a subpœna duces tecum. *Barnstead* v. *Empire Mining Co.*, 5 Cal. 300.

9. The statement of a witness when sane, in relation to his own condition at the time of sale, ought to be conclusive, and the party introducing this witness is estopped from denying his sanity. *Montgomery* v. *Hunt*, 5 Cal. 368.

10. The confidential counselor, solicitor or attorney of a party, or his clerk, cannot be required to disclose communications made to him professionally. *Landsberger* v. *Gorham*, 5 Cal. 451.

11. A party has no right to cross-examine a witness, except as to facts and circumstances connected with the matter stated in his direct examination. *Ib.* 452.

12. In case of lost instruments, where no copy has been preserved, it is not to be expected that a witness can recite its contents, word for word. It is sufficient if intelligent witnesses who have read the paper understood its object, and can state it with precision. *Posten* v. *Rasette*, 5 Cal. 469.

13. Attendance upon any court as a witness, juror or party, only exempts the person so in attendance from arrest in a civil action, but not from obeying any ordinary process of a court. *Page* v. *Randall*, 6 Cal. 33.

14. Any witness may be introduced on the trial by consent of the court, notwithstanding he was not before the grand jury, subject only to the rights of the prisoner to a postponement, in case such evidence should operate as a surprise upon him. *People* v. *Freeland*, 6 Cal. 98.

15. A party committed for refusing to

answer questions propounded to him as a witness, under an order that he stand committed till he answer the questions, will be discharged on habeas corpus, where it appears that the suit has abated; there being no longer parties or subject matter before the court, there is no longer a case in which the question can be asked. *Ex parte Rowe*, 7 Cal. 176.

16. A commitment for contempt, "in refusing to answer certain questions propounded to the witness by the grand jury, "is not a compliance with the statute, which requires that when the contempt consists in the omission to do an act which it was in the power of the person to perform, "the act shall be specified in the commitment." It does not appear from such commitment whether the questions were legal or not. *Ib.* 183.

17. In such a case the commitment should state that the grand jury were inquiring into a certain question, stating it, that the prisoner was sworn as a witness and certain questions asked him, stating them, that he refused to answer, that the facts were thereupon presented to the court by the grand jury, and the prisoner requested by the court to answer, which being refused by the prisoner, he was committed for contempt. And this rule is based upon the power of an appellate court to review on habeas corpus the proceedings of an inferior court in cases of contempt. The character of the questions need not be made public, as they could be propounded in writing. *Ib.*

18. Where the answer of a witness would subject him to criminal punishment, he is not privileged from answering on the ground that his answer would disgrace him, but solely on the ground that he is not compelled to criminate himself. *Ib.* 184.

19. The amendatory act of 1855 provides that "the testimony given by such witness shall in no instance be given against himself, in any criminal prosecution;" the witness having thus the protection contemplated by the constitution, is bound to answer. *Ib.* 185.

20. The only case where the witness is privileged from answering a question on the ground that his answer would disgrace him is, when it is not pertinent to the issue. *Ib.*

21. In a prosecution for assault with intent to commit murder, where the prosecuting witness was asked on cross-examination if he did not previous to the assault buy a pistol to use upon the defendant, to which he answered in the affirmative; it was competent for the district attorney to ask the witness to state his reasons for so doing; and his answer that he was induced to do so by "what he was informed by a third person the defendant had said," was competent to show the motive of the witness. *People* v. *Shea*, 8 Cal. 539.

22. The mistake of counsel as to the competency of a witness is no ground for granting a new trial. *Packer* v. *Heaton*, 9 Cal. 571.

23. There is no precise age in which children are excluded from giving testimony. Their competency is to be determined not by their age, but by the degree of their understanding and knowledge. *People* v. *Bernal*, 10 Cal. 66.

24. If over fourteen years of age, the presumption is that they possess the requisite knowledge and understanding; but if under that age, the presumption is otherwise, and it must be removed upon their examination by the court, or under its direction and in its presence, before they can be sworn. *Ib.* 67.

25. Where to a certificate of proof, by a subscribing witness, of the execution of a deed, the witness adds his signature and the officer adds the usual jurat to an affidavit, such additions do not vitiate the certificate, if without them it shows a substantial compliance with the requirements of the statute. The signature of the witness and the jurat may be rejected as surplusage. *Whitney* v. *Arnold*, 10 Cal. 532.

26. A subscribing witness to a written instrument, if within the jurisdiction of the court, must be produced, or some sufficient reason given for his absence. *Stevens* v. *Irwin*, 12 Cal. 308.

27. The knowledge of an agent in the course of the agency is the knowledge of the principal, and the agent cannot be forced to disclose it. But if the agent acquires information apart from or independent of such course, he is not protected from disclosing it. *Hunter* v. *Watson*, 12 Cal. 377.

28. Where a subscribing witness to a bill of sale is out of the State, and the proof is that witness saw subscribing wit-

ness put his name to it, and saw grantor sign it, and recognizes the paper from hearing it read, not being able to read himself, and another witness testifies that the signature of the subscribing witness is in his hand writing; this is sufficient evidence to identify the paper and authorize it to be read in evidence. *Mc Garrity* v. *Byington*, 12 Cal. 430.

29. A subscribing witness who is called to prove the execution of the instrument, who testifies that it was signed in his presence "to the best of his recollection," is sufficient to allow it to be read in evidence. *Ib.*

30. To make the copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witnesses to the deed, if such there be, should be had, at least to the fact of the execution of the paper, unless they are shown to be without the jurisdiction of the court. *Smith* v. *Brannan*, 13 Cal. 115.

31. An answer responsive to and denying the charges in a bill in equity is not evidence for the defendant, though the bill be sustained by one witness only. *Goodwin* v. *Hammond*, 13 Cal. 169; *Bostic* v. *Love*, 16 Cal. 72.

32. On motion by defendant to change the place of trial, on the ground that he is sued in the county in which he does not reside, if plaintiff resist the motion because of the convenience of witnesses, the evidence as to the convenience should be as full and particular as that which is required upon an application, for this cause, to transfer the trial to another county. The affidavit must state the names of the witnesses. *Loehr* v. *Latham*, 15 Cal. 420.

33. As a matter of practice, where defendant moves to transfer the cause to the county of his residence, plaintiff may resist by a counter motion to retain the cause on account of the convenience of witnesses, notwithstanding the residence of defendant, and then defendant can reply to the allegations as to the convenience of witnesses; or plaintiff, instead of a counter motion, may simply resist the motion of the defendant; but reasonable time should be allowed defendant, if desired, to meet the matter set up in opposition to the original motion. *Ib.*

34. A court may reject the most positive testimony, although the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief. *Blankman* v. *Vallejo*, 15 Cal. 645.

35. The equity rule requiring two witnesses to controvert an answer under oath does not prevail in this State. The answer is only a pleading, and is not evidence for defendant. *Bostic* v. *Love*, 16 Cal. 72.

II. When a Party, or Interested in the Action.

36. Our statute allowing persons to testify in their own cases is in derogation of the common law rule, and opens a wide door to perjury, and cannot be too strictly construed by the court, and when the interest of a codefendant is so inseparable that the testimony of either must necessarily enure to the other's benefit, the evidence must be rejected. *Hotaling* v. *Cronise*, 2 Cal. 63; *Sparks* v. *Kohler*, 3 Cal. 301; *Buckley* v. *Manife*, 3 Cal. 442; *Johnson* v. *Henderson*, 3 Cal. 369.

37. A defendant may be examined on behalf of his codefendants, if their interests are divisible. *Beach* v. *Covillaud*, 2 Cal. 239.

38. Where a codefendant is called generally as a witness, and he was clearly incompetent on one of the isssues, the court should properly reject him, unless he is examined on the specific point, as to prove his codefendant was not his partner. *Sparks* v. *Kohler*, 3 Cal. 301.

39. Where an accomplice or codefendant in a criminal action, under the statute of this State, elects to be tried separately, he is a competent witness for the other defendants charged with the same offense, the credibility of his testimony being left to the jury. *People* v. *Labra*, 5 Cal. 184.

40. Under our statute no person can be excluded as a witness on account of interest in the event of the action, unless he may be a party, or one for whose immediate benefit the action is prosecuted or defended. *Tomlinson* v. *Spencer*, 5 Cal. 293.

41. An endorser not a party to an action on the note is a competent witness for the plaintiff, where it does not appear that the suit is prosecuted for his immediate benefit. *Ib.*

42. An agent is a competent witness to testify as to his authority in the performance of acts for his reputed principal, though he be a secret partner. *Ib.*

43. A person who gave bond to the sheriff to save him harmless in holding the identical property which is the subject of the action, is not competent as a witness in the action. He must be treated as one for whose immediate benefit the suit is brought. *Landsberger* v. *Gorham*, 5 Cal. 452.

44. Where the clerk of a court is called as a witness to prove the records of which he is clerk, it is no objection that he is interested in the result of the suit. *Price* v. *Dunlap*, 5 Cal. 485.

45. A defendant who had suffered default is not competent as a witness to prove that he was authorized by his codefendant to sign his name to a note, as by so doing he would reduce the amount of judgment against himself. *Washburn* v. *Alden*, 5 Cal. 464.

46. A broker whose commission depends upon his principal's recovery is incompetent as a witness, on the ground that he is directly interested in the event of the suit. *Shaw* v. *Davis*, 5 Cal. 466.

47. In an action against a corporation, a witness who was a member of the corporation when the liabilities were incurred on which the action is brought, but who had sold out before the commencement of the action, is incompetent, for interest. *McAuley* v. *York Mining Co.*, 6 Cal. 81.

48. In an action against the endorser of a note, where demand and notice are not averred, but where it is averred that the maker paid the endorser the value of the note, and that the endorser agreed to pay it, the maker of the note is not a competent witness to prove these facts. *Palmer* v. *Tripp*, 6 Cal. 83.

49. A defendant who has not been served with process is not a competent witness for his codefendant in an action of trespass. *Gates* v. *Nash*, 6 Cal. 194.

50. The maker of a note after judgment against him is a competent witness for the endorser, because his interest is equally balanced. *Vance* v. *Collins*, 6 Cal. 439.

51. An endorser of a note is incompetent as a witness to establish the lien of a holder of a note upon the property of the maker, being directly interested to have the lien established. *Soule* v. *Dawes*, 6 Cal. 475.

52. A witness in an action for a disputed mining claim, who was in the employ of the party in possession at fixed wages, to be paid, however, from the proceeds of the claim, is not incompetent when his wages are not dependent upon the sufficiency of such proceeds. *Live Yankee Co.* v. *Oregon Co.*, 7 Cal. 42.

53. A defendant or plaintiff cannot testify in behalf of his codefendants or coplaintiffs. *Lucas* v. *Payne*, 7 Cal. 96; *Turner* v. *McIlhaney*, 8 Cal. 579.

54. In an action where the defense set up is the negligence of the servant of plaintiff, the servant is not a competent witness for his employer. *Finn* v. *Vallejo Street Wharf Co.*, 7 Cal. 256.

55. Where the defeat of plaintiff would inevitably result in S. obtaining the fund in controversy: held, that S., although not a party to the suit, was incompetent as a witness. *McEwen* v. *Johnson*, 7 Cal. 260.

56. A party who calls on an adverse party to testify, makes him a witness, and waives his incompetency to be heard for himself, or for his codefendants or coplaintiffs. *Turner* v. *McIlhaney*, 8 Cal. 580.

57. The liability of a witness to either party, in case of a certain result of the suit, must be legal, and not moral, and the consequent interest present, certain and vested, in order to exclude the witness. *Jones* v. *Love*, 9 Cal. 69.

58. Where a party is called as a witness by the other side, and on his cross-examination testifies to new matter, his opponent may be called on his own behalf in rebuttal of this new matter. *Ib.*

59. If a party be improperly joined as defendant, the court or jury, upon application, should first pass upon his case, and after he is discharged he could then be examined as a witness for the other defendant. *Domingo* v. *Getman*, 9 Cal. 102.

60. In an action by a company of miners to recover possession of a mining claim and damages for its detention, a person who was a member of the company at the time of the alleged detention, and who, prior to the commencement of the suit, in consideration of unpaid assessments, sold his interest to his copartners in the claim, without warranty, is not a competent witness, as he is interested in the damage sought to be recovered. *Packer* v. *Heaton*, 9 Cal. 570.

When a Party, or Interested in the Action.

61. Where L., a commission merchant, sued out an attachment against H., and had certain goods seized as the property of H., but which were claimed by C., and L. gave the sheriff an indemnity bond, which he accepted, and held the goods under the attachment, and subsequently sold the same to satisfy the attachment, C. brought suit against the sheriff for the value of the goods, the sheriff having released L. from all actions arising out of the seizure and sale of the goods, and having also released him after the commencement of the suit: held, that L. was a competent witness in the suit of C. against the sheriff. *Perlberg* v. *Gorham*, 10 Cal. 124.

62. A person who has been a stockholder in an incorporated company, but ceased to be such holder before suit was brought, is a competent witness in an action in the name of such company. *Tuolumne County Water Co.* v. *Columbia and Stanislaus River Water Co.*, 10 Cal. 195.

63. The lessor of plaintiffs is a competent witness in an action for a trespass to the leased premises, when the lease does not bind him to protect the plaintiffs against trespassers. *Mc Cormick* v. *Bailey*, 10 Cal. 232.

64. On the trial of a cause where defendant calls the plaintiff as a witness, after the examination in chief he has a right to testify on his own behalf generally as to the matters in issue. *Drake* v. *Eakin*, 10 Cal. 312; *Tuolumne County Water Co.* v. *Columbia and Stanislaus River Water Co.*, 10 Cal. 396.

65. A vendor by a quit claim deed is a competent witness in an action of ejectment by the vendee against a third party to recover possession of the premises. *Johnson* v. *Parks*, 10 Cal. 448.

66. To make the testimony of a witness admissible he must be competent at the time of taking his deposition. It is the effect of the interest on the witness at the time his testimony is taken that disqualifies him. *Kimball* v. *Gearhart*, 12 Cal. 46.

67. In an action of trespass for entering upon the mining ground of plaintiff and digging the same up and converting the gold bearing earth, the vendor of plaintiff is a competent witness, although a part of the purchase money is still due him. *Rowe* v. *Bradley*, 12 Cal. 230.

68. In an action of foreclosure of a mortgage brought by the administrator upon a note and mortgage given to the intestate in his lifetime, a witness whose wife is a sister and heir of the deceased is incompetent upon the ground of interest. *Lisman* v. *Early*, 12 Cal. 286.

69. Where the vendee of a lot of wheat released his vendor from all damages by reason of any implied warranty of the title to the wheat, which was then in litigation between the vendee and a third party, such release made the vendor a competent witness. *Paige* v. *O'Neal*, 12 Cal. 486.

70. In a suit against the maker of a note, or the acceptor of a bill, the endorser is a competent witness for either party. *Bryant* v. *Watriss*, 13 Cal. 87.

71. Generally a vendor with warranty of title is not a competent witness for his vendee in a controversy concerning the title. *Blackwell* v. *Atkinson*, 14 Cal. 471.

72. If the action concern the title to personal property, the vendor is a competent witness for a second or any subsequent vendee, the objection going only to his credibility. *Ib.*

73. In real estate the covenant of warranty runs with the land, and the vendor is directly liable to the person evicted, and is not a competent witness for plaintiff. *Ib.*

74. In suit on an account for services rendered and materials furnished in the course of his trade, and for articles furnished from his farm by plaintiff, who was a blacksmith and farmer, he is a competent witness to prove to the court his book of original entries, as preliminary to the introduction of the book in evidence. And having testified that the book was kept by himself; that it was his book of original entries in which he kept his accounts; that the entries were made by him at the time they purport to have been made; that he kept no other books; and had no clerk—the book was sufficiently proved to be admitted in evidence. *Landis* v. *Turner*, 14 Cal. 574.

75. And being admitted, its entries, accompanied with proof of the party's reputation in the neighborhood of keeping correct accounts, by persons who had dealt with him, were sufficient prima facie evidence of the specific services rendered and of their value, and of the specific materials furnished and their price; it not appearing that any higher evidence was attainable. *Ib.* 575.

76. The fact that the charges are first made on a slate and then transferred to the book does not affect the character of the book as one of original entries— the charges on the slate being mere memoranda, not intended to be permanent. *Ib.*

77. But the transfer must not be long delayed, otherwise the book will be rejected, unless the delay be satisfactorily explained. A delay of three days is not unreasonable. *Ib.* 576.

78. A party who permits himself to stand on the books of a water company, corporated under the statutes of this State, as a stockholder, and holds the office of secretary— to which no person but a stockholder is eligible— is not a competent witness for the company, in an action against it for overflowing plaintiffs' mining claim. He is liable for the debts of the company, and therefore interested. *Wolf* v. *St. Louis Independent Water Co.*, 15 Cal. 320.

79. The fact that the stock was held in his name in trust for another— the transfer having been made simply to enable him to become an officer of the company— does not relieve him from responsibility. *Ib.*

80. Von S., deputy United States surveyor, was called as a witness, on behalf of plaintiffs in ejectment on a patent, to prove that the premises in controversy were within the calls of the patent, and in the occupation of defendant, and on his voir dire stated that he was married to a daughter of plaintiffs, and had about two years previously, and after the patent was issued, purchased, in his own name, land covered by the grant, upon the confirmation of which the patent issued. Defendant objected to the witness, as interested in the grant as part owner, and on the ground that his wife was interested, and hence, that he was disqualified: held, that the ownership of the witness in parcels of land covered by the grant, other than the premises in controversy, did not disqualify him; that he could not, from such ownership, gain or lose by the direct legal operation and effect of the judgment, nor could the judgment be legal evidence for or against him in any other action. *Mott* v. *Smith*, 16 Cal. 556.

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1. *When the Assignor of a Party to the Action.*

81. Where the plaintiff was the assignee of a claim, the written contract upon which it was founded having been destroyed by the assignor, before the assignment, it was error to admit the assignor as a witness to prove the contents of the written paper thus destroyed by him. *Smith* v. *Truebody*, 2 Cal. 347.

82. The assignor of a chose in action is incompetent as a witness for the assignee. *Jones* v. *Post*, 4 Cal. 15; *Griffin* v. *Alsop*, 4 Cal. 408; *Allen* v. *Citizen's Steam Nav. Co.*, 6 Cal. 402; *Adams* v. *Woods*, 8 Cal. 321.

83. A substantial and formal assignee stand upon the same ground; neither can introduce the assignor as a witness. *Adams* v. *Woods*, 8 Cal. 321.

84. As a general rule, the vendor of goods is not a competent witness to impeach the sale made by himself, but where evidence tending to show a collusion between the vendor and purchaser to defraud the creditors of the former is introduced, the declarations of the vendor are admissible, and a fortiori his sworn statement. *Howe* v. *Scannell*, 8 Cal. 327.

85. An assignor of an agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, may be a witness for the assignee in an action on the agreement, as it is not for an unliquidated demand. *Gray* v. *Garrison*, 9 Cal. 328.

86. If in any case one partner can assign to another partner his interest in a firm claim, and then become a witness for him, he cannot when the claim is for goods sold and delivered, because this is an unliquidated demand within the practice act. *Cravens* v. *Dewey*, 13 Cal. 42.

87. Where goods are seized by the sheriff on an execution against G., and the owners of the goods, so in the sheriff's hands, assign them to plaintiff, who replevins them on the ground of fraud in the original sales, the assignors are competent witnesses for plaintiff. This is not assigning a chose in action, but a sale of specific goods. *Coghill* v. *Boring*, 15 Cal. 218.

88. A witness is not disqualified, because of a mere expectation of deriving, from a suit, some advantage, to which he is not legally entitled. *Ib.*

III. Absent Witnesses.

89. Affidavits upon which a motion is founded to continue a criminal cause should show due diligence in endeavoring to procure the attendance of witnesses and in preparing for trial. *People* v. *Baker*, 1 Cal. 404.

90. On a motion for new trial on the ground of surprise at the trial by the non-attendance of witnesses, the affidavits, in endeavoring to procure the attendance of the witnesses, should set forth that reasonable diligence has been used in endeavoring to procure the attendance of the witnesses, and should set forth particularly and distinctly the facts which the party expects to prove by the witnesses. *Rogers* v. *Huie*, 1 Cal. 432.

91. A defendant applied for a continuance to enable him to take the deposition of a witness whose evidence would be of no avail in his defense, and in which he showed no diligence: held, that the application was properly rejected. *Hawley* v. *Stirling*, 2 Cal. 473.

92. An affidavit for a continuance on the ground of the absence of a witness, should state that the testimony wanted is merely cumulative and cannot be proved by others, and that the application is not made for delay. The character of the diligence used in trying to obtain the attendance of the witness, whether by exhausting the process of the law or otherwise, should also be stated. *People* v. *Thompson*, 4 Cal. 241.

93. Affidavits for a continuance should show that the facts expected to be proved by the absent witnesses cannot otherwise be proved. *People* v. *Quincy*, 8 Cal. 89; *Pierce* v. *Payne*, 14 Cal. 420.

94. A new trial not granted on the affidavit of the attorney of record that he, as well as his client and witnesses, were absent on the trial of the case because of a verbal agreement by opposing counsel to give notice on the day of trial, when such affidavit is met by counter affidavits of the opposing counsel, and when an attorney did appear and contest the case on the trial. *McDonald* v. *Bear River and Auburn W. and M. Co.*, 13 Cal. 230.

95. An affidavit for continuance, on the ground that a witness is absent, when the opposite party admits that the witness would testify to the facts set forth, is evidence, but not conclusive proof, of its contents: it must be regarded only as a deposition. *Blankman* v. *Vallejo*, 15 Cal. 645.

IV. Impeaching a Witness.

96. Where one who had acted as interpreter and attorney, in relation to the execution of a deed, on being called as a witness testified that he had read the deed to the grantor, and what had passed at the time of the execution: and he subsequently received a conveyance of a part of the land from the plaintiff, it was held that the defendant might prove that this witness had made to other persons a different statement of the facts as testified to by him. *McDaniel* v. *Baca*, 2 Cal. 338.

97. A witness who is called to impeach another may answer that he would not believe such other witness on oath. This last has been the uniform practice in this State, and no injury has resulted from such practice. *Stevens* v. *Irwin*, 12 Cal. 308.

98. Where a witness is sought to be impeached by proof of contradictory statements alleged to have been made by him, the precise matter of these contradictions, and the time and place of the contradictory statements must be brought to the knowledge of the witness on cross-examination. *Baker* v. *Joseph*, 16 Cal. 178.

99. And this rule, as to evidence of contradictory statements, applies equally to evidence of declarations or acts of hostility or ill feeling on the part of the witness. There is no distinction between admitting declarations of hostility of witness, by way of impairing the force of his testimony, and admitting contradictory statements, so far as this rule is concerned. *Ib.*

100. Where the objection to such impeaching evidence was general, and the court excluded the testimony without assigning any reason, the supreme court will presume in favor of the correctness of the action of the court below; and the appellant must show error to his prejudice, by putting his exception in the proper shape. *Ib.*

101. To impeach the testimony of F., a witness for plaintiff, by showing that on a former occasion he had sworn different-

ly, defendant offered in evidence a statement on motion for a new trial and on appeal, in a former suit between the parties, purporting to contain all the evidence, and agreed to as correct by the attorneys therein, in which statement there appeared the testimony of F. on the trial: held, that the statement was not admissible; that it was made for a particular purpose, and was not proof except for that purpose—certainly not to impeach F., who neither made nor signed it. *Payne* v. *Treadwell*, 16 Cal. 239.

V. Experts.

102. In an action to recover the value of services as attorney in a certain suit, it is incompetent to prove the value of plaintiff's services by a witness who is not an attorney. *Hart* v. *Vidal*, 6 Cal. 57.

103. The opinions as to the value of labor upon a contract, by a person not an expert, cannot be received as evidence. *Reynolds* v. *Jourdan*, 6 Cal. 111.

104. A stock raiser is a competent witness to estimate the damage done to cattle by falling through a wharf. *Polk* v. *Coffin*, 9 Cal. 58.

105. The opinions of witnesses are generally admissible only when they relate to matters of science or art, or to skill in some particular profession or business. *Hastings* v. *Steamer Uncle Sam*, 10 Cal. 342.

VI. Witness to a Will.

106. Evidence may be offered to prove a custom that no more than two witnesses were necessary to the validity of a will. *Panaud* v. *Jones*, 1 Cal. 500.

107. An executor named in a will, who is neither heir or legatee, may be a witness to the execution of a will. *Ib.* 505.

108. On the trial of an issue of fact involving the validity of a will, a subscribing witness thereto is not rendered incompetent as a witness by holding lands devised therein in trust for a devisee and without having any interest himself therein. *Peralto* v. *Castro*, 6 Cal. 357.

109. And where such trustee had issued a covenant of warranty to a purchaser of a portion of such lands, but was fully indemnified against loss thereby, by the cestui que trust, and also held what he thought a sufficient portion of the purchase money so received as further indemnity, he is a competent witness. *Ib.* 358.

110. Where a will was attested by two witnesses and made before a person who was a sindico: held, the fact that such person signed the instrument as sindico, did not the less render him a witness. *Tevis* v. *Pitcher*, 10 Cal. 477.

111. Where the testator and the witnesses to a will are dead, proof of the signatures of the witnesses and testator will be sufficient evidence of its due execution. *Ib.* 478.

See Evidence, Deposition.

Words.

1. No words of reproach how grievous soever, are sufficient provocation to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter. *People* v. *Butler*, 8 Cal. 441.

2. To support the condition of a bond, the court will transpose or reject insensible words, and construe it according to the obvious intent of the parties. *Swain* v. *Graves*, 8 Cal. 551.

3. "Actual"—The word "actual," in the statute of frauds, was designed to exclude the idea of a mere formal change of possession, and the word "continued," to exclude the idea of a mere temporary change of possession. But it was never the design of the statute to give such extension of meaning to this phrase, "continued change of possession," as to require, upon penalty of a forfeiture of the goods, that the vendor should never have any control over or use of them. *Stevens* v. *Irwin*, 15 Cal. 506.

4. "Agent"—Appended to a name has always been held to be merely descriptio personæ, and in no respect affects his liability. *Sayre* v. *Nichols*, 5 Cal. 487.

5. "Agent"—All attorneys in fact are agents, but all agents are not necessarily attorneys in fact. Agent is the general

term which includes brokers, factors, assignees, shipmasters, and all other classes of agents. *Porter* v. *Hermann*, 8 Cal. 624.

6. "Agent"—The words "agent, trustee, guardian, administrator," and the like, added to the name of the signer, do not qualify the terms in the body of the obligation, when those terms impart a duty of payment by such signer. *Haskell* v. *Cornish*, 13 Cal. 47.

7. "Annually"—Does not mean a measure of time, but a succession of calendar years. *People* v. *Brenham*, 3 Cal. 488.

8. "Appurtenances"—Is too vague a term to comprehend in its meaning any personal property as the subject of levy, in a sheriff's sale. *Monroe* v. *Thomas*, 5 Cal. 471.

9. "Bailment"—A proper understanding of the word "bailment" justifies us in the conclusion that the legislature intended to use the word in a limited sense, as designating bailees to keep, to transfer, or to deliver. *People* v. *Cohen*, 8 Cal. 43.

10. "Belief"—The word "belief," as used in the statute, in verification, is to be taken in its ordinary sense, and means the actual conclusion of the defendant drawn from information. *Humphreys* v. *Mc Call*, 9 Cal. 62.

11. "Black, Indian and White Person"—Are generic terms, and refer to the great types of mankind. *People* v. *Hall*, 4 Cal. 402.

12. "Special cases"—Are confined to such new cases as are the creation of statutes. *Parsons* v. *Tuolumne County Water Co.*, 5 Cal. 44.

13. "Conscience"—It will not do to say that conscience and principle are used in common parlance as synonymous; we have shown that they have a distinct and separate meaning, well recognized, and we are bound to suppose that the legislature employ words with reference to their correct legislation. *People* v. *Stewart*, 7 Cal. 144.

14. "Conveyance"—In the act of April 16, 1850, is made to embrace mortgages. *Call* v. *Hastings*, 3 Cal. 184.

15. "Exclusive of costs"—Is used in the judiciary act of 1789, ex industria. *Gordon* v. *Ross*, 2 Cal. 157.

16. "By matter in dispute"—In section four, article six of the constitution, is meant the subject of litigation. It is the matter for which the suit is brought, upon which issue is joined, and in relation to which the witnesses are examined, juries are called and the verdict is rendered. *Dumphy* v. *Guindon*, 13 Cal. 30.

17. "Cumulative"—In the act creating the board of supervisors for the counties in this State, was intended to bear such a signification as to give the board of supervisors of San Francisco county the same powers that were conferred upon the boards created in other counties, and where additional powers were given to other counties, the same were also to apply. *Dewitt* v. *City of San Francisco*, 2 Cal. 339.

18. "Good and sufficient deed"—Only refers to the form of conveyance. *Brown* v. *Covillaud*, 6 Cal. 573.

19. "Duration"—By a reference to lexicographers it will be found that the word "duration" signifies "extent, limit, or time." When, therefore, the time of holding is not fixed, the tenure of the office is at the pleasure of the appointing power. This power of removal cannot be divested or taken away except by limiting the term. *People* v. *Hill*, 7 Cal. 102.

20. "Next election by the people"—Means the next election after the vacancy happens. *People* v. *Mott*, 3 Cal. 506.

21. "Fiador"—Means a guarantor or endorser. *Lightstone* v. *Laurencel*, 4 Cal. 277.

22. "All intents and purposes whatever"—In the statute of Queen Anne, relative to gaming debts, made the statute apply to notes in the hands of third persons. *Haight* v. *Joyce*, 2 Cal. 66.

23. "Heirs"—Though a deed was made to a party who is dead, and "his heirs," the word "heir" is not a word of purchase carrying title to the heirs, but only qualifying the title of the grantee. *Hunter* v. *Watson*, 12 Cal. 376.

24. "Prescribed by law"—Looks to actual legislation upon the subject matter, and in no just sense extends the exercise of the power to others. *Exline* v. *Smith*, 5 Cal. 113.

25. "May and shall"—In the construction of the law are convertible terms. *Cooke* v. *Spears*, 2 Cal. 412.

26. "Mortgage"—The term "mortgaged" is very definite and certain in itself, but the parties have added, "as security for the payment of the monthly rent

herein stipulated," thus giving an express definition of the sense in which the term is used. *Barroilhet* v. *Battelle*, 7 Cal. 452.

27. "Mortgage"—No particular words are necessary to create a mortgage. The words "we mortgage the property," when accompanied by a provision for the sale of it in case the money, recited in the instrument as being thus secured, be not paid, are clearly sufficient. *De Leon* v. *Higuera*, 15 Cal. 496.

28. "Opinion"—The terms "opinion" and "decisions" are often confounded, yet there is a wide difference between them. A decision of the court is its judgment; the opinion is the reasons given for that judgment. *Houston* v. *Williams*, 13 Cal. 27.

29. "Or"—This word is substituted for "on" in the printed copies of the constitution, in the fourth section of the sixth article. It should be "and in criminal cases amounting to felony *on* questions of law alone." *People* v. *Applegate*, 5 Cal. 295.

30. "Original"—Is a general term of limitation, contradistinguished from the term appellate. *Reed* v. *McCormick*, 4 Cal. 343.

31. "Powder magazine"—Contradistinguished from house, place or building. *Harley* v. *Heyl*, 2 Cal. 482.

32. "To purchase any property"—And "to erect or lease" public buildings, used in separate and distinct sentences in a municipal charter, give the power to purchase lands to the municipality. *De Witt* v. *City of San Francisco*, 2 Cal 296.

33. "With absolute powers to dispose of"—Ought not, in the statute of husband and wife, to be extended to a disposition by devise. *Beard* v. *Knox*, 5 Cal. 256.

34. "Shall reside and acquire property"—In the act of husband and wife, does not confer upon wives actually being or residing in the State, greater privileges than to those abroad. *Ib.* 257.

35. "Shipped"—It cannot, in a contract, be construed to mean a warranty that the goods had been shipped. It is rather used to describe and ascertain the property. *Middleton* v. *Ballingall*, 1 Cal. 417.

36. "Supervisors"—The word "supervisors," when applied to county officers, has a legal signification. The duties of the officer are various and manifold—sometimes judicial, and at others legislative and executive. *People* v. *Supervisors of El Dorado County*, 8 Cal. 62.

37. "Transport"—Under its generic and common meaning, would include *towing* another vessel. *White* v. *Steam Tug Mary Ann*, 6 Cal. 470.

38. "Use"—The provision in the agreement for a reconveyance upon the payment of the precise amount of the consideration of the conveyance, and three hundred dollars a month for the use thereof, is a circumstance favoring the conclusion that the debt subsisted. The term "use," in this instance, means interest. *Hickox* v. *Lowe*, 10 Cal. 207.

39. "Vacancy"—Defined to be the absence of an officer from his office. *People* v. *Wells*, 2 Cal. 223.

40. "Wagon"—Is intended to mean a common vehicle for the transportation of goods, wares and merchandise of all descriptions. *Quigley* v. *Gorham*, 5 Cal. 418.

WORK AND LABOR.

1. In an action brought to recover the contract price agreed to be paid for work and materials, the defendant will not be permitted to insist at the trial that the work was done in an unworkmanlike manner, unless he has set up such defense in his answer. *Kendall* v. *Vallejo*, 1 Cal. 372.

See MECHANICS' LIEN.

WRITS.

WRIT OF ARREST, See ARREST.

WRIT OF ASSISTANCE, See ASSISTANCE.

WRIT OF ATTACHMENT, See ATTACHMENT.

WRIT OF CERTIORARI, See CERTIORARI.

WRIT OF EJECTMENT, See EJECTMENT.

WRIT OF ERROR, See ERROR.

WRIT OF EXECUTION, See EXECUTION.

WRIT OF INJUNCTION, See INJUNCTION.

WRIT OF MANDAMUS, See MANDAMUS.

WRIT OF REPLEVIN, See REPLEVIN.

WRIT OF RESTITUTION, See EJECTMENT, FORCIBLE ENTRY AND DETAINER, VI.

See CONSTABLE, CORONER, ELIZOR, SHERIFF, SUMMONS.

YUBA COUNTY.

1. Under the Act of April 28th, 1857, authorizing the supervisors of Yuba county to take stock in a railroad company, the stock may be taken in any railroad by which a railway connection shall be formed between Marysville and Benicia, or any point on the Sacramento river at or near Knights' Ferry. The company in which the stock is taken need not be constituted for the express and only purpose of such connection; *provided*, the effect of the work is to make such connection. *Pattison* v. *Supervisors of Yuba County*, 13 Cal. 189.

TABLE

OF

TITLES AND THEIR SUBDIVISIONS.

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N. B.—THE PROFESSION ARE REQUESTED TO EXAMINE THE PAGES AND CORRECT THE SAME BY THIS TABLE.

PAGE			
46,	2nd	column,	10th line, for "24 Cal." read "14 Cal."
55,	1st	"	27th line, for "123" read "125."
58,	1st	"	48th line, for "267" read "367."
62,	2nd	"	50th line, for "10 Cal." read "16 Cal."
88,	1st	"	21st line, for "305" read "414."
88,	1st	"	24th line, for "119" read "199."
88,	2nd	"	12th line, for "5 Cal." read "3 Cal."
93,	1st	"	39th line, for "cases" read "causes."
93,	2nd	"	22nd line, for "6 Cal." read "9 Cal"
103,	1st	"	44th line, for "responsible" read "responsive."
127,	2nd	"	34th line, for "23" read "213."
154,	1st	"	18th line, for "mortgagee" read "mortgagor."
154,	2nd	"	33rd line, for "collection" read "correction."
155,	1st	"	43rd line, for "8 Cal. 80" read "15 Cal 80."
186,	1st	"	47th line, for "renewed" read "reviewed."
189,	2nd	"	33th line, read "Judson v. Atwill, 9 Cal. 478."
192,	2nd	"	16th line, for "2 Cal." read "3 Cal."
217,	2nd	"	41st line, for "6 Cal." read "7 Cal."
221,	1st	"	25th line, omit "10 Cal."
221,	2nd	"	41st line, for "1 Cal." read "11 Cal."
229,	2nd	"	47th line, for "2 Cal." read "3 Cal."
234,	2nd	"	56th line, for "6 Cal." read "9 Cal."
238,	2nd	"	41st line, for "16 Cal." read "15 Cal."
302,	2nd	"	17th line, for "2 Cal. 38" read "2 Cal. 36."
312,	1st	"	53rd line, for "7 Cal." read "8 Cal."
320,	1st	"	33rd line, for "4 Cal." read "3 Cal."
337,	2nd	"	48th line, for "23" read "213."
340,	2nd	"	30th line, for "7 Cal." read "8 Cal."
344,	2nd	"	48th line, for "8 Cal." read "7 Cal."
354,	1st	"	14th line, for "7 Cal." read "1 Cal."

PAGE.			
372,	1st	column,	2nd line, for "Corter" read "Porter."
494,	2nd	"	14th line, for "13 Cal." read "10 Cal."
507,	1st	"	6th line, for "action denied" read "answer denied."
520,	1st	"	50th line, for "jurisdiction" read "justification."
521,	2nd	"	29th line, read "Hart v. Burnett, 15 Cal. 616," and 30th line, for "616" read "634."
524,	2nd	"	27th line, for "sufferer" read "sufficient."
524,	2nd	"	31st line, for "536" read "563."
573,	1st	"	24th line, for "mortgagee" read "mortgagor."
574,	1st	"	11th line, for "147" read "417."
574,	2nd	"	37th line, for "13 Cal." read "7 Cal."
598,	1st	"	37th line, for "Bell" read "Belloc."
599,	2nd	"	31st line, for "3 Cal." read "4 Cal."
602,	2nd	"	14th line, for "injunctions" read "questions."
603,	1st	"	12th line, for "presumptive" read "preventive."
606,	1st	"	14th line, for "Hoffman v. Sanders" read "Heyman v. Landers."
631,	1st	"	42nd line, for "232" read "132."
636,	1st	"	28th line, for "10 Cal." read "11 Cal."
652,	1st	"	47th line, for "15 Cal." read "16 Cal."
830,	2nd	"	26th line, for "302" read "320."
831,	2nd	"	7th line, for "48" read "98."
849,	2nd	"	15th line, read "It had power."
849,	2nd	"	23rd line, for "sufficient" read "insufficient."
849,	2nd	"	41st line, for "truth" read "proof."
940,	2nd	"	18th line, for "61" read "161."
987,	1st	"	12th line, omit "3."
996,	2nd	"	29th line, for "8 Cal." read "9 Cal."
998,	1st	"	28th line, for "3 Cal." read "2 Cal."